Supreme Court, U.S.
FILED

NOV 18 2008

OFFICE OF THE CLERK

No. 08-686

IN THE

Supreme Court of the United States

PAUL BOSCHETTO, PETITIONER

v.

JEFFREY D. HANSING; FRANK-BOUCHER CHRYSLER DODGE-JEEP; GORDIE BOUCHER FORD; BOUCHER AUTOMOTIVE GROUP

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

KENNETH D. SIMONCINI
Counsel of Record

KERRI A. JOHNSON

Simoncini & Associates
1694 The Alameda
San Jose, CA 95126
(408) 280-7711

Attorneys for Petitioner

QUESTIONS PRESENTED

1. Whether the sale of an item through an internet auction site such as eBay provides the requisite "minimum contacts" to support personal jurisdiction over a non-resident defendant in the buyer's forum state?

2. Whether "purposeful availment" can be found utilizing the "effects test" enunciated in *Calder v. Jones*, 465 U.S. 783 (1984) to confer jurisdiction over the seller of merchandise through an Internet auction site, such as eBay, where it is alleged that the seller committed a tortious act in the forum state arising from the transaction?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT PROVISIONS INVOLVED 1

STATEMENT 2

REASONS FOR GRANTING THE PETITION 4

CONCLUSION 13

APPENDIX

Circuit Court Opinion 1a
District Court Judgment 25a
District Court Order 26a

TABLE OF AUTHORITIES

Page

CASES

ALS Scan, Inc. v. Digital Service Consultants, Inc., 293 F.3d 707, 714 (4th Cir. 2002) 8
Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985) 5, 6
Burnham v. Superior Court, 495 U.S. 604, 630 ..... 12, 13
Calder v. Jones, 465 U.S. 783 (1984) 7
Compuserve, Incorporated v. Patterson, 89 F.3d 1257, 1264 (6th Cir. 1996) 6
Digital Equip. Corp. v. AltaVista Technology, Inc., 960 F.Supp. 456, 471 (D. Mass. 1997) 11, 12
Dudnikov v. Chalk, 514 F.3d 1063, 1072 (10th Cir. 2008) 8
EDIAS Software International, LLC v. BASIS International, Ltd., 947 F. Supp. 413, 420 (Ariz. 1996) 7
Fletcher Jones West Shara v. Rotta, 919 So.2d 685 (Fla.App. 3 Dist. 2006) 8
Gorman v. Ameritrade Holding Corp., 293 F.3d 506, 510-511 ..... 11, 12
Hanson v. Denckla, 357 U.S. 235, 250-251 (1958) 6
International Shoe Co. v. Washington, 326 U.S. 310, 316 5
Internet Doorway, Inc. v. Parks, 138 F.Supp. 2d 773, 779-780 (S.D. Miss. 2001) 8
Marschke v. Wratislaw, 743 N.W.2d 402 (S.D. 2007) 9
People v. Lipsitz, 663 N.Y.S.2d 468, 473-474 (Sup.Ct. N.Y. Cty. 1997) 11
Verizon Online Services v. Ralsky, 203 F.Supp. 2d 601, 611, 610 (E.D. Va. 2002) 8
Wein Air Alaska, Inc. v. Brandt, 195 F.3d 208, 213 (5th Cir. 1999) 8
Zippo Mfg. Co. v. Zippo DOT Com, 952 F.Supp. 1119 (D. Pa. 1997) 9, 10

STATUTES

28 U.S.C. §1254(1) 1

RULES

Federal Rule of Civil Procedure 12(b)(2) 1
Supreme Court Rule 10(c) 4

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is dated August 20, 2008 and is a published decision.

The order of the United States District Court, for the Northern District of California is dated July 17, 2006 and is a published decision.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

The Ninth Circuit's opinion was rendered on August 20, 2008.

RELEVANT PROVISIONS INVOLVED

Federal Rule of Civil Procedure 12(b)(2).

> (b) How presented. Every defense, in law or fact, to a claim for relief in any pleadings, whether a claim, counterclaim, cross-claim, or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:
>
> . . .
>
> (2)lack of jurisdiction over the person...

STATEMENT

This lawsuit was filed to recover damages arising out of a fraudulent sale of an automobile on eBay. On February 26, 2006, Petitioner Paul Boschetto filed a Complaint for Damages containing the following causes of action: Consumer Legal Remedies Act [Calif.Civ.C. Section 1750, et. seq], Breach of Contract, Misrepresentation and Fraud. Said complaint was filed in the United States District Court, Northern District of California.

The crux of this lawsuit is that Respondents advertised and eventually sold a vehicle to Petitioner on eBay which was not as represented. Petitioner is a resident of the State of California; Respondents are residents of the State of Wisconsin.

eBay (www.ebay.com) and eBay Motors (www.motors.ebay.com) are well known internet auction sites where people can buy and sell merchandise. In this particular case, Respondent Jeffrey Hansing, an employee of Respondent Frank Boucher Chrysler Dodge Jeep, Gordie Boucher Ford and Boucher Automotive Group (hereinafter "Dealership") advertised a 1964 Ford Galaxie as a classic car item on eBay Motors.

Hansing advertised the subject vehicle as a 500 XL 427/425 hp "R Code" in awesome condition, not restored, rust free, chrome in excellent condition, recently rebuilt and ready to be driven. Based upon this advertisement, Petitioner bid for the subject vehicle and was notified on August 8, 2005 that his was

the winning bid. Petitioner paid Respondent Hansing a total of $34,106 for the vehicle.

Arrangements were made for Petitioner to have the vehicle picked up from Respondent Dealership. The vehicle was shipped from Dealership to Petitioner in San Francisco, California. Upon arrival, Petitioner discovered that the vehicle was not as represented in many respects. Petitioner sought to return the vehicle in exchange for the amount paid, but Respondent Hansing refused.

Hansing and Dealership each filed separate motions to dismiss for lack of personal jurisdiction. Petitioner opposed both motions on substantive grounds, and alternatively requested the district court issue an order allowing limited discovery on the issue of jurisdiction.

On July 17, 2006, the district court issued it's order and judgment dismissing the complaint against all defendants and denying Petitioner's request to conduct the requested jurisdictional discovery. In granting the motions to dismiss, Hon. Vaughn Walker held, *inter alia*, that this transaction was a "one shot affair" and that exercising personal jurisdiction would be improper because "Hansing's actions were not purposefully directed at the forum state." The district court further found that "auction sales on eBay are 'random' and 'attenuated.' App. 32a-33a.

The district court also denied Petitioner's request for limited discovery on the issue of jurisdiction.

Petitioner appealed the district court's ruling to the Ninth Circuit Court of Appeals. The Ninth Circuit affirmed the district court's ruling, holding that Petitioner could not establish "purposeful availment" by virtue of this eBay transaction. App. 8a The Court of Appeal additionally held that the district court did not err in denying Boschetto the requested discovery. App. 13a.

The Ninth Circuit's decision was filed on August 20, 2008.

REASONS FOR GRANTING THE PETITION

This case falls within the parameters of Supreme Court Rule 10(c) in that the Ninth Circuit Court of Appeals has decided an important question of federal law, jurisdiction, that has not been, but should be settled by this Court. With the ever increasing use of the internet as a means for not only businesses, but individuals, to sell their wares over an ever expanding geographic area, the issue of jurisdiction over these transactions is becoming increasingly important to ensure that the "traditional notions of fair play and substantial justice" are not abrogated by this country's technological advances.

I. REVIEW IS WARRANTED BECAUSE THIS CASE PRESENTS AN IMPORTANT QUESTION OF THE STANDARDS FOR PERSONAL JURISDICTION IN CASES INVOLVING TRANSACTIONS OVER THE INTERNET

A. *The Issue Decided By The Ninth Circuit Is An Important Question That Should Be Directly Settled By This Court*

This Court has issued numerous decisions over the years on the issue of personal jurisdiction. Due process considerations require that a defendant have sufficient "minimum contacts" with the forum state so as to not offend traditional notions of fair play and substantial justice. *International Shoe Co. v. Washington*, 326 U.S. 310, 316; *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985).

This Court established a three prong test for determining whether specific personal jurisdiction is proper. First, the defendant must have sufficient minimum contacts with the forum state. Second, the claim asserted against the defendant must arise out of those contacts. Finally, the exercise of jurisdiction must be reasonable. *Burger King, supra*, at page 475.

The first prong, which is the crux of the case before this Court, presents an issue of due process. In evaluating "minimum contacts," this Court has developed the "purposeful availment" test. "Purposeful availment" translates into a finding that the defendant's contacts with the forum state are not random, fortuitous or attenuated. As stated in *Burger King*,

supra, at page 475 "there must be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."

This court went on to state in *Burger King* that "jurisdiction is proper, however, where contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum state."
Id. at p. 475.

"As technological progress has increased the flow of commerce between States, the need for jurisdiction has undergone a similar increase." *Hanson v. Denckla*, 357 U.S. 235, 250-251 (1958). With emergence of the Internet, which has opened up the marketplace not only to businesses, but to individuals, a standard is needed which balances not only the constitutional protections for the sellers of the merchandise, but of the buyers as well.

It is accepted that physical presence in the forum state is not required to confer jurisdiction. "The soliciting of insurance by mail, the transmission of radio broadcasts into a state, and the sending of magazines and newspapers into a state to be sold there by independent contractors are all accomplished with the physical presence of an agent; yet all have been held to constitute the transaction of business in a state." *Compuserve, Incorporated v. Patterson*, 89 F.3d 1257, 1264 (6th Cir. 1996).

Petitioner submits that sales facilitated by an Internet auction site, such as eBay, are really no

different than soliciting sales in other forums via newspaper, mass mailings, or other similar media. The crux of the inquiry is whether the defendant seller intended that the solicitation reach residents of other states. The fact that fact that the seller who places an item up for auction has no say in who is ultimately the highest bidder does not detract from the fact that the seller intentionally placed the item for sale in the first place. The purpose of a site like eBay is to reach the widest possible audience; the seller knows that he or she may be consummating a transaction in another jurisdiction, but *knowingly* places the item on eBay in order to obtain the highest possible price.

As such, a seller of merchandise over the Internet "should not be permitted to take advantage of modern technology through an Internet Web page and forum and simultaneously escape traditional notions of jurisdiction." *EDIAS Software International, LLC v. BASIS International, Ltd.*, 947 F. Supp. 413, 420 (Ariz. 1996).

1. *Purposeful Availment and The "Effects Test" Enunciated in Calder v. Jones*

This court has also developed the "effects test" set forth in *Calder v. Jones*, 465 U.S. 783 (1984). This test requires a showing by the plaintiff that defendant committed an intentional act which was expressly aimed at the forum state (or someone within the forum state) and caused harm.

The Tenth Circuit recently analyzed the "effects test" in deciding the issue of jurisdiction in a case involving the termination of an auction on eBay. While

not specifically addressing the issues of sales over eBay, the application of the "effects test" by the court in *Dudnikov v. Chalk*, 514 F.3d 1063, 1072 (10th Cir. 2008) is significant.

Other courts have utilized the *Calder* test to find jurisdiction. The Florida court of appeal found that a personal jurisdiction was proper over a defendant who sold a vehicle to plaintiff through eBay, and misrepresented to the buyer the quality, value and condition of the vehicle. Relying, in part, on the *Calder* test, the court held that jurisdiction was proper since the plaintiff plead that defendant committed a tort within the State of Florida. *Fletcher Jones West Shara v. Rotta*, 919 So.2d 685 (Fla.App. 3 Dist. 2006). *See also McGuire v. Lavoie*, (N.D. Tex. 2003) Action No. 3:03-CV-0161BH (holding that "when the actual content of communications with a forum gives rise to an intentional tort cause of action, this alone constitutes purposeful availment" citing *Wein Air Alaska, Inc. v. Brandt*, 195 F.3d 208, 213 (5th Cir. 1999)).

In a similar vein, it has been held that purposefully directing spam to Internet users, without knowledge of where they reside, is sufficient to confer personal jurisdiction. *Verizon Online Services v. Ralsky*, 203 F.Supp. 2d 601, 611, 610 (E.D. Va. 2002); *Internet Doorway, Inc. v. Parks*, 138 F.Supp. 2d 773, 779-780 (S.D. Miss. 2001). *See also, ALS Scan, Inc. v. Digital Service Consultants, Inc.*, 293 F.3d 707, 714 (4th Cir. 2002)(holding that a state may exercise personal jurisdiction over a defendant who electronically directs activity towards a state with the intent of engaging in business or other interactions there and the activity creates a cognizable cause of action).

Other courts, facing similar factual scenarios, have ruled the personal jurisdiction is improper. *See Marschke v. Wratislaw*, 743 N.W.2d 402 (S.D. 2007); *Ginsburg v. Dinicola*, (Mass.6-7-2007) Action No. 06-11509RWZ.

In the instant action, Boschetto has alleged, in part, that Hansing committed fraud and misrepresentation in selling the subject vehicle to him via the eBay auction. Analysis of the issue of "purposeful availment" using the principles enunciated in *Calder* and discussed in other cases, was lacking in the court of appeal's decision. The Ninth Circuit acknowledged in it's opinion that it evaluated the "purposeful availment" analysis using the contract cases, not tort cases such as *Calder v. Jones*. App. 7a. Like those cases dealing with issues of misrepresentation or fraud, once Hansing was aware that Boschetto resided in California, and consummated the fraudulent transaction, he availed himself of the forum state of California and could and should be expected to be haled into court there to defend his conduct.

2. *Development of the sliding scale analysis developed in the Zippo case*

One of the first cases to deal with the issue of personal jurisdiction in an internet transaction was *Zippo Mfg. Co. v. Zippo DOT Com*, 952 F.Supp. 1119 (D. Pa. 1997). The *Zippo* court created a 'sliding scale' rule based on the type of internet site through which the transaction was made. As noted by the court there,

> "...the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet. This sliding scale is consistent with well developed jurisdictional principles."

Zippo, supra at p. 1124.

The *Zippo* court went on to define this sliding scale. On one end are the situations where the defendant clearly conducts business on an ongoing basis. In that situation, jurisdiction is proper. On the opposite end of the spectrum is the defendant who maintains a website for informational purposes only, with no interactivity. This type of website is not sufficient to confer personal jurisdiction.

"The middle ground is occupied by interactive web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the web site. [citation]." *Zippo, supra,* at p. 1124.

The Ninth Circuit in this case acknowledged that a transaction through eBay falls within this middle ground in that eBay is an "interactive" web site. App. 10a. The court, however, goes on to hold that this "one shot affair" was insufficient to confer personal jurisdiction.

Federal and State appellate courts across the land have developed variant views on personal

jurisdiction in internet transaction cases following the *Zippo* sliding scale analysis.

The New York Supreme Court has noted that

> "for Internet consumer fraud claims, the Internet medium is essentially irrelevant, for the focus is primarily upon the location of the messenger and whether the messenger delivered what was purchased. In some cases, it might be necessary to analyze the location of certain other business operations, such as the site used or the place orders were received."

People v. Lipsitz, 663 N.Y.S.2d 468, 473-474 (Sup.Ct. N.Y. Cty. 1997).

The district court in Massachusetts summarized the arguments made by Boschetto in the instant action, when it declared:

> "On the one hand, it troubles me to force corporations that do business over the Internet...to now factor in the potential costs of defending against litigation in each and every state...On the other hand, it is also troublesome to allow those who conduct business on the Web to insulate themselves against jurisdiction in every state, except in the state (if any) where they are physically located."

Digital Equip. Corp. v. AltaVista Technology, Inc., 960 F.Supp. 456, 471 (D. Mass. 1997).

As stated in *Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506, 510-511,

> "Just as our traditional notions of personal jurisdiction have proven adaptable to other changes in the national economy, so too are they adaptable to the transformation wrought the by the Internet. In the last century, for example, courts held that, depending upon the circumstances, transactions by mail and telephone could be the basis for personal jurisdiction notwithstanding the defendant's lack of physical presence in the forum. There is no logical reason why the same should not be true of transactions accomplished through the use of e-mail or interactive websites. Indeed, the application of this precedent is quite natural since much communication over the internet is still transmitted by ordinary telephone lines."

The differing views of personal jurisdiction, as determined by ever increasing transactions over the Internet generally, and over auction sites like eBay, specifically, require a definitive rule of the applicable constitutional guidelines established by this Court. The evolution of technology has resulted in an evolving standard of reasonableness, commensurate with "contemporary notions of due process." *Burnham v. Superior Court*, 495 U.S. 604, 630.

As the Massachusetts court recognized in *Digital Equip. Corp., supra*, it would be patently unreasonable and unfair to allow a seller, like Hansing, to take advantage of modern technology in advertising his vehicle to residents of every state in this nation, selling

his vehicle to a California resident knowing that the buyer is in California, and then turn around and invoke rules of jurisdiction which as applied to the facts at hand to not comport with "contemporary notions of due process. *Burnham, supra.*

CONCLUSION

For all of the foregoing reasons, petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

Kenneth D. Simoncini*
Kerri A. Johnson
Simoncini & Associates
1694 The Alameda
San Jose, CA 95126
(408) 280-7711
Attorneys for Petitioner
*Counsel of Record

(any footnotes trail end of each document)

No. 06-16595

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL BOSCHETTO,
Plaintiff-Appellant,

v.

JEFFREY D. HANSING; FRANK-BOUCHER CHRYSLER DODGE-JEEP; GORDIE BOUCHER FORD; BOUCHER AUTOMOTIVE GROUP,
Defendants-Appellees.

May 14, 2008, Argued and Submitted, San Francisco, California

August 20, 2008, Filed

JUDGES: Before: Betty B. Fletcher and Pamela Ann Rymer, Circuit Judges, and Kevin Thomas Duffy, * District Judge. Opinion by Judge B. Fletcher; Concurrence by Judge Rymer.

OPINION BY: Betty B. Fletcher

OPINION

B. FLETCHER, Circuit Judge:

This appeal presents a question that remains surprisingly unanswered by the circuit courts: Does the sale of an item via the eBay Internet auction site provide sufficient "minimum contacts" to support

personal jurisdiction over a nonresident defendant in the buyer's forum state? Plaintiff-Appellant Paul Boschetto ("Boschetto") was the winning bidder for a 1964 Ford Galaxie sold on eBay by the Defendant-Appellee, Jeffrey Hansing ("Hansing") for $ 34,106. Boschetto arranged for the car to be shipped from Wisconsin to California, but upon arrival it failed to meet his expectations or the advertised description. Boschetto sued in federal court; his complaint was dismissed for lack of personal jurisdiction. We now affirm.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Boschetto lives in San Francisco, California.[1] Defendant-Appellee Jeffrey D. Hansing resides in Milton, Wisconsin. *Id.* Defendants-Appellees Frank-Boucher Chrysler Dodge-Jeep, Gordie Boucher Ford and Boucher Automotive Group ("Boucher Defendants") are private corporations with their principal places of business in Wisconsin. The Boucher Defendants operate a website that advertises their auto dealerships, although it is not alleged that this website was connected in any way with the transaction at issue in this case. Hansing is an employee of one of the Boucher Defendants, Frank Boucher Chrysler Dodge-Jeep. The complaint avers that on August 1, 2005, all Defendants "owned and advertised [ ] a 1964 Ford Galaxie 500 XL 427/425 hp 'R Code' in awesome condition, not restored, rust free chrome in excellent condition, recently rebuilt and ready to be driven, with clear title, and a vehicle warranty number of 4E68R149127."

The car was advertised for sale on the eBay Internet auction site; a copy of a portion of the eBay listing was attached to Boschetto's complaint. *Id.* The eBay listing indicated that the item was located in Janesville, Wisconsin. Boschetto bid $ 34,106 for the Galaxie on August 8, 2005, and was notified through eBay that same day that he was the winning bidder. *Id.* Boschetto and Hansing communicated via email to arrange for delivery of the vehicle from Wisconsin to California. Boschetto ultimately hired a transport company to pick up the car in Wisconsin; it arrived in California on September 15, 2005. *Id.*

Upon delivery, Boschetto discovered that the car was not an "R Code" as advertised, and noted a variety of other problems, including a motor that would not turn over, rust, and extensive dents on the body of the vehicle. *Id.* Boschetto contacted eBay and Hansing in an attempt to rescind the purchase, but those efforts failed. *Id.* He filed a complaint in United States District Court, Northern District of California on February 23, 2006. Boschetto alleged four state law causes of action (violation of the California Consumer Protection Act; breach of contract; misrepresentation; and fraud), and pled jurisdiction pursuant to the federal diversity statute, 28 U.S.C. § 1332(a).

All Defendants moved to dismiss based on lack of personal jurisdiction. On July 13, 2006, the district court granted the motion. The district court reasoned that the lone jurisdiction-ally relevant contact with California, an eBay sale consummated with a California purchaser, was insufficient to establish jurisdiction over any of the Defendants. Although Hansing used eBay to market the automobile, the district court observed that

"eBay acted not as a 'distribution center' but rather as a virtual forum for the exchange of goods," and that in a standard eBay transaction--like the one at issue in this appeal--the item goes to whomever is the highest bidder, and so "the eBay seller does not purposefully avail himself of the privilege of doing business in a forum state absent some additional conduct directed at the forum state." *Id.*

The district court also rejected Boschetto's request to conduct additional discovery relevant to jurisdiction. *Id.* Noting its "broad discretion" to permit or deny such discovery, the court found that Boschetto's request for further discovery was premised on "speculat[ion] without any support" that the additional discovery would yield jurisdictionally relevant information. *Id.* Judgment was entered on July 17, 2006 and this timely appeal followed.

II. PERSONAL JURISDICTION

We review a dismissal for lack of personal jurisdiction *de novo*. *See Myers v. Bennett Law Offices*, 238 F.3d 1068, 1071 (9th Cir. 2001). In opposition to a defendant's motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of establishing that jurisdiction is proper. *See Sher v. Johnson*, 911 F.2d 1357, 1361 (9th Cir. 1990). If the district court decides the motion without an evidentiary hearing, which is the case here, then "the plaintiff need only make a prima facie showing of the jurisdictional facts." *Id.* (citation omitted). Absent an evidentiary hearing this court "only inquire[s] into whether [the plaintiff's] pleadings and affidavits make a prima facie showing of personal jurisdiction." *Caruth v. Int'l Psychoanalytical Ass'n*, 59

F.3d 126, 127-28 (9th Cir. 1995). Uncontroverted allegations in the plaintiff's complaint must be taken as true. *See AT&T*, 94 F.3d at 588. "Conflicts between the parties over statements contained in affidavits must be resolved in the plaintiff's favor." *Schwarzenegger v. Fred Martin Co.*, 374 F.3d 797, 800 (9th Cir. 2004).

When no federal statute governs personal jurisdiction, the district court applies the law of the forum state. *See Panavision Int'l L.P. v. Toeppen*, 141 F.3d 1316, 1320 (9th Cir. 1998). California's long-arm statute is co-extensive with federal standards, so a federal court may exercise personal jurisdiction if doing so comports with federal constitutional due process. *Id.* at 1320. "For a court to exercise personal jurisdiction over a nonresident defendant, that defendant must have at least 'minimum contacts' with the relevant forum such that the exercise of jurisdiction 'does not offend traditional notions of fair play and substantial justice.'" *Schwarzenegger*, 374 F.3d at 801 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 2d 95 (1945)). There are two forms of personal jurisdiction that a forum state may exercise over a nonresident defendant--general jurisdiction and specific jurisdiction. We deal here only with the latter.[2]

A. The district court correctly dismissed Boschetto's complaint for lack of personal jurisdiction.

We apply a three-part test to determine whether the exercise of specific jurisdiction over a nonresident defendant is appropriate:

> (1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform (some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
>
> (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and
>
> (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.

Id. at 802 (citing *Lake v. Lake*, 817 F.2d 1416, 1421 (9th Cir. 1987)). The plaintiff bears the burden on the first two prongs. *Id.* If the plaintiff establishes both prongs one and two, the defendant must come forward with a "compelling case" that the exercise of jurisdiction would not be reasonable. *Id.* (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-78, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)). But if the plaintiff fails at the first step, the jurisdictional inquiry ends and the case must be dismissed. *See Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1155 (9th Cir. 2006) ("[Plaintiff's] arguments fail under the first prong. Accordingly, we need not address [the remaining two prongs].").

For part one of this three-part test, we have typically analyzed cases that sound primarily in contract--as Boschetto's case does--under a "purposeful availment" standard. *Schwarzenegger*, 374 F.3d at 802 ("We often use the phrase 'purposeful availment' in shorthand

fashion, to include both purposeful availment and purposeful direction, but availment and direction are, in fact, two distinct concepts. A purposeful availment analysis is most often used in suits sounding in contract.") (internal citation omitted); *see also McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 817 (9th Cir. 1988) (distinguishing purposeful direction precedents where "personal jurisdiction is sought on a contract claim, not on a tort claim"). To have purposefully availed itself of the privilege of doing business in the forum, a defendant must have "performed some type of affirmative conduct which allows or promotes the transaction of business within the forum state." *Sher*, 911 F.2d at 1362 (internal quotation marks and citation omitted). Our evaluation of the jurisdictional significance of a defendant's contract or other business in the forum is not rigid and formalistic, but rather practical and pragmatic. *Burger King Corp.*, 471 U.S. at 478 ("[W]e have emphasized the need for a highly realistic approach that recognizes that contract is ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction.") (internal quotation marks and citation omitted); *Lake*, 817 F.2d at 1421 ("The first step of the specific jurisdiction analysis involves a *qualitative* evaluation of the defendant's contact with the forum state.") (emphasis added). In doing so, we are guided by the Supreme Court's admonition that the formation of a contract with a nonresident defendant is not, standing alone, sufficient to create jurisdiction. *Burger King Corp.*, 471 U.S. at 478 ("If the question is whether an individual's contract with an out-of-state party *alone* can automatically establish sufficient minimum contacts in the other party's home forum, we

believe the answer clearly is that it cannot.") (emphasis in original); *see also McGlinchy*, 845 F.2d at 816 n.9 (same).

Here, Boschetto fails at step one of the test for specific jurisdiction, as the lone transaction for the sale of one item does not establish that the Defendants purposefully availed themselves of the privilege of doing business in California. The arrangement between Boschetto and Hansing which is, at bottom, a contract for the sale of a good, is insufficient to have created a substantial connection with California. Hansing (and assuming *arguendo* that they had any involvement in the transaction, the Boucher Defendants) did not create any ongoing obligations with Boschetto in California; once the car was sold the parties were to go their separate ways. Neither Boschetto's complaint nor his affidavit in opposition to dismissal point to any continuing commitments assumed by the Defendants under the contract. *Id.* Nor did performance of the contract require the Defendants to engage in any substantial business in California. On Boschetto's version of the facts, funds were sent to Wisconsin and arrangements were made to pick up the car there and have it delivered to California. This was, as the district court observed, a "one-shot affair." *See Compuserve, Inc. v. Patterson*, 89 F.3d 1257, 1265 (6th Cir. 1996)). As the Supreme Court has expressly cautioned, a contract alone does not automatically establish minimum contacts in the plaintiff's home forum. *See Burger King Corp.*, 471 U.S. at 478; *see also Doe v. Unocal Corp.*, 248 F.3d 915, 924 (9th Cir. 2001) ("However, an individual's contract with an out-of-state party alone [cannot] automatically establish sufficient minimum contacts to support personal jurisdiction.") (internal quotation

marks and citations omitted); *cf. Travelers Health Ass'n v. Commonwealth of Va*, 339 U.S. 643, 647, 70 S. Ct. 927, 94 L. Ed. 1154 (1950) (purposeful availment found if "business activities reach out beyond one state and create *continuing relationships and obligations*") (emphasis added).[3]

Ignoring the limited nature of the transaction at issue, Boschetto attaches special significance to the fact that the transaction was consummated via eBay, noting that the eBay listing could have been viewed by anyone in California (or any other state for that matter) with Internet access. But the fact that eBay was used as the conduit for this sale does not affect the jurisdictional outcome, at least not on the particular facts presented here.

In *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 419 (9th Cir. 1997), we discussed with approval a sliding scale analysis that looks to how interactive an Internet website is for purposes of determining its jurisdictional effect. ("In sum, the common thread, well stated by the district court in *Zippo*, is that the 'likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of the commercial activity that an entity conducts over the Internet.'") (quoting *Zippo Mfg. Co. v. Zippo Dot Com*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997)). The plaintiff in *Cybersell* relied on the fact that the defendant operated a website, accessible in the forum state, that contained allegedly infringing trademarks. 130 F.3d at 416. The defendant's website advertised its services but did not allow parties to transact business via the site. *Id.* at 419. Noting the lack of interactivity on the defendant's website, the court concluded that the defendant had

"done no act and [ ] consummated no transaction, nor has it performed any act by which it purposefully availed itself of the privilege of conducting activities, in Arizona, thereby invoking the benefits and protections of Arizona law." *Id.*

The *Cybersell* analysis, while persuasive where the contact under consideration is the website itself, is largely inapplicable in this case. Here, eBay was used to create a listing for the sale of a good. Based on a superficial application of *Cybersell*, the eBay listing process and the sale it engenders is "interactive." *Id.* (noting the lack of evidence suggesting that defendant's website resulted in any business generation). But, as the district court noted, "the issue is not whether the court has personal jurisdiction over the intermediary eBay but whether it has personal jurisdiction over an individual who conducted business over eBay." In *Cybersell* and related cases where the Internet site actually belongs to and is operated by the defendant, the nature of the website has jurisdictional significance because the website allows the defendant to maintain some ongoing contact with the forum state (as well as every other state that can access the site). *See Zippo*, 952 F. Supp. at 1125-26 ("We are being asked to determine whether Dot Com's conducting of electronic commerce with Pennsylvania residents constitutes the purposeful availment of doing business in Pennsylvania."). Here, the eBay listing was not part of broader e-commerce activity; the listing temporarily advertised a good for sale and that listing closed once the item was sold, thereby extinguishing the Internet contact for this transaction within the forum state (and every other forum).[4]

Moreover, Boschetto does not allege that any of the Defendants are using eBay to conduct business generally. He does not allege that Defendants conduct regular sales in California (or anywhere else) via eBay. Based on his own affidavit he named the Boucher Defendants based on a "good faith belief" that Hansing may have been acting as their agent during the sale. But he does not go on to allege--on information and belief or otherwise--that either Hansing or the Boucher Defendants are regular users of the eBay sales platform to sell their cars.[5]

This is a distinction with a difference, as the cases that have found that jurisdiction was proper based on eBay sales relied heavily on the fact that the defendant was using the platform as a broader vehicle for commercial activity. *See, e.g., Crummey v. Morgan*, 965 So.2d 497, 500 (Ct. App. La. 2007) (evidence of two prior sales to Louisiana residents in prior year); *Dedvukaj v. Maloney*, 447 F. Supp. 2d 813, 822-23 (E.D. Mich. 2006) ("Although the Court's research has not disclosed any personal jurisdiction cases involving the use of eBay auctions as a commercial seller's primary marketing vehicle, it is clear from the record that Defendants' use of eBay is regular and systemic."); *Malcolm v. Esposito, 63 Va.* Cir. 440, 2003 WL 23272406 at *4 (Va. Cir. Ct. Dec. 12, 2003) ("Defendants are commercial sellers of automobiles who, at the time the BMW was sold, were represented on eBay as 'power sellers' with 213 transactions.").

At bottom, the consummation of the sale via eBay here is a distraction from the core issue: This was a one-time contract for the sale of a good that involved the forum state only because that is where the purchaser

happened to reside, but otherwise created no "substantial connection" or ongoing obligations there. *See McGee*, 355 U.S. at 223. The Supreme Court has, in the past, sounded a note of caution that traditional jurisdictional analyses are not upended simply because a case involves technological developments that make it easier for parties to reach across state lines. *World-Wide Volkswagen*, 444 U.S. at 293 ("[W]e have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution.").

The use of eBay no doubt made it far easier to reach a California buyer, but the ease with which Boschetto was contacted does not determine whether the nature and quality of the Defendants' contacts serve to support jurisdiction. That is not to say that the use of eBay digs a virtual moat around the defendant, fending off jurisdiction in all cases. Where eBay is used as a means for establishing regular business with a remote forum such that a finding of personal jurisdiction comports with "traditional notions of fair play and substantial justice," *International Shoe Co.*, 326 U.S. at 316, then a defendant's use of eBay may be properly taken into account for purposes of establishing personal jurisdiction. *See Crummey*, 965 So.2d at 500; *Dedvukaj*, 447 F. Supp. 2d at 822-23; *Malcolm*, 63 Va. Cir. 440, 2003 WL 23272406 at *4. But on the facts of this case--a one-time transaction--the use of eBay as the conduit for that transaction does not have any dispositive effect on jurisdiction.[6]

B. The district court did not abuse its discretion by denying Boschetto's request for jurisdictional discovery.

A district court's decision to permit or deny jurisdictional discovery is reviewed for abuse of discretion. *See Data Disc, Inc. v. Systems Tech. Assoc., Inc.*, 557 F.2d 1280, 1285 n.1 (9th Cir. 1977). The district court's refusal to provide such discovery, "will not be reversed except upon the clearest showing that denial of discovery results in actual and substantial prejudice to the complaining litigant. Discovery may be appropriately granted where pertinent facts bearing on the question of jurisdiction are controverted or where a more satisfactory showing of the facts is necessary." *Id.* (citing *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 430 n.24 (9th Cir. 1977)).

The district court did not abuse its discretion by denying Boschetto's request for jurisdictional discovery. Boschetto does not allege that the Boucher Defendants' dealership website is used to conduct sales, merely that it can be viewed by potential customers. Moreover, Boschetto does not allege that any of the Defendants made any other eBay sales or posted listings either before or after the initiation of the lawsuit. While it might be jurisdictionally relevant if Hansing or the Boucher Defendants had used eBay to conduct a significant quantity of automobile sales to California residents or in other states, neither Boschetto's complaint nor his affidavit allege that any of the Defendants are engaged in such sales. The denial of Boschetto's request for discovery, which was based on little more than a hunch that it might yield jurisdictionally relevant facts, was not an abuse of

discretion. *See Butcher's Union Local No. 498 v. SDC Inv., Inc.*, 788 F.2d 535, 540 (9th Cir. 1986) (holding that district court did not abuse its discretion by refusing jurisdictional discovery where the plaintiffs "state only that they 'believe' discovery will enable them to demonstrate sufficient California business contacts to establish the court's personal jurisdiction").

III. CONCLUSION

The sale of one automobile via the eBay website, without more, does not provide sufficient "minimum contacts" to establish jurisdiction over a nonresident defendant in the forum state. Likewise, given the total absence of any evidence or allegations that the conduct here involved more than just this one sale, the district court did not abuse its discretion by refusing to allow jurisdictional discovery.

AFFIRMED.

Footnote

*The Honorable Kevin Thomas Duffy, Senior United States District Judge for the Southern District of New York, sitting by designation.

1The summary of facts is taken from Boschetto's complaint and his affidavit filed in opposition to the motion to dismiss. For purposes of determining whether the court has personal jurisdiction over Defendants, the court assumes Boschetto's allegations are true. *See AT&T v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 588 (9th Cir. 1996).

2The district court summarily, and correctly, rejected Boschetto's contention that the Defendants could be subject to general jurisdiction in California. Boschetto does not challenge that aspect of the district court's dismissal order on appeal.

3In *Burger King* the Court noted that even a "single act" by the defendant can support jurisdiction, but only if that act creates a "substantial connection" with the forum. 471 U.S. at 476 n.18 (quoting *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223, 78 S. Ct. 199, 2 L. Ed. 2d 223) (1957)). The Court's reliance on *McGee* is, however, telling. In *McGee*, the record suggested there was only one contract between the defendant and any California resident. 355 U.S. at 222. But the Court did not decide the jurisdictional issue on a quantitative assessment of the number of contracts the defendant had entered into in the forum state; rather, it looked to the content or qualitative nature of the contract before it, and reasoned that the contract gave rise to ongoing obligations that connected the defendant with the forum state. *Id.* at 223. Applied here, it is not the fact that Defendants may have entered into only one contract with a California resident that is dispositive. Rather, it is the fact that the nature of the contract entered into did not create any "substantial connection" between Boschetto and the Defendants beyond the contract itself. *Id.* ("It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State.").

4Under a traditional jurisdictional analysis, advertising in a forum state does not typically suffice to establish personal jurisdiction. *See Wood v. Santa Barbara Chamber of Commerce*, 705 F.2d 1515, 1522 (9th Cir.

1983); *Holland America Line, Inc. v. Wartsila North America, Inc.*, 485 F.3d 450, 460 (9th Cir. 2007).

5It is for this reason that Boschetto's reliance on *Stomp, Inc. v. NeatO LLC*, 61 F.Supp.2d 1074 (C.D. Cal. 1999) is misplaced. In *Stomp,* the defendant used its own website as a portal for on-line sales, and the defendant consummated at least a "small" number of sales in the forum state. *Id.* at 1078. 6We note that our affirmance of the district court's dismissal is in-line with a number of state court decisions that have addressed whether personal jurisdiction can be established by way of a single eBay transaction with a forum plaintiff. *See e.g., Sayeedi v. Wasler*, 15 Misc. 3d 621, 628, 835 N.Y.S.2d 840, 2007 WL 623521 (N.Y. Civ. Ct. 2007) ("No evidence was provided by Plaintiff as to Defendant's overall eBay statistics, experience, or any marketing directed at potential customers, designed for instance, to welcome bids from New Yorkers or any other acts that indicate Defendant may be purposely availing himself specifically to the business of New Yorkers or any desire to take advantage of New York law."); *Gossett v. HBL, LLC*, 2006 U.S. Dist. LEXIS 30435, 2006 WL 1328757 at *2 (D.S.C. 2006 May 11, 2006) ("[Defendant's] mere listing on eBay is not enough to invoke jurisdiction in South Carolina."); *Karstetter v. Voss*, 184 S.W.3d 396, 405 (Tex. App. 2006) ("There was no evidence that appellees traveled to Kansas or engaged in other transactions with appellant or other Kansas residents either through the eBay service or otherwise."); *Metcalf v. Lawson*, 148 N.H. 35, 802 A.2d 1221, 1227 (N.H. 2002) ("Finally, what appears to be the isolated nature of this transaction and the absence of any evidence that the defendant was a commercial seller militate against a finding of

jurisdiction.").
CONCUR

RYMER, Circuit Judge, concurring:

I agree that jurisdiction is lacking. I write separately to underscore my disagreement with Boschetto's argument that Hansing, as a seller on eBay, necessarily availed himself of the privilege of doing business in each state across the nation. I believe that a defendant does not establish minimum contacts nationwide by listing an item for sale on eBay; rather, he must do "something more," such as individually targeting residents of a particular state, to be haled into another jurisdiction.

The basic principles are well settled. Personal jurisdiction is proper if it is consistent with the forum state's long-arm statutes and if it comports with due process of law. *Fireman's Fund Ins. Co. v. Nat'l Bank of Coops.*, 103 F.3d 888, 893 (9th Cir. 1996). California's long-arm statute extends the exercise of personal jurisdiction to the limits of due process. *Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1129 (9th Cir. 2003) (citing Cal. Code Civ. Pro. § 410.10). For due process to be satisfied, a defendant must have "minimum contacts" with the forum state such that the assertion of jurisdiction "does not offend traditional notions of fair play and substantial justice." *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1155 (9th Cir. 2006) (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 315, 66 S. Ct. 154, 90 L. Ed. 95 (1945)).

This circuit applies a three-part test to determine whether a plaintiff has demonstrated sufficient

minimum contacts to establish specific jurisdiction over a defendant. Minimum contacts are found where:

(1) the defendant has performed some act or consummated some transaction within the forum or otherwise purposefully availed himself of the privileges of conducting activities in the forum, (2) the claim arises out of or results from the defendant's forum related activities, and (3) the exercise of jurisdiction is reasonable.*Id.* at 1155 (citing *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000)). The plaintiff bears the burden of satisfying the first two prongs of the test, and the defendant bears the burden on the third. *Id.* Boschetto falls short on the first prong.

The "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of "random," "fortuitous," or "attenuated" contacts. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475-76, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985) (citations omitted). We have refined this to mean that the defendant must either have "purposefully availed" himself of the privilege of conducting activities in the forum, thus invoking the benefits and protections of its laws, or have "purposefully directed" his activities toward the forum. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 807 (9th Cir. 2004).

A defendant "purposefully avails" himself of a forum when he acts in a way that creates a "substantial connection" with the state, *Burger King*, 471 U.S. at 475, *see also Kulko v. California Superior Court*, 436 U.S. 84, 94, n.7, 98 S. Ct. 1690, 56 L. Ed. 2d 132 (1978), as where he deliberately engages in significant

activities there, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781, 104 S. Ct. 1473, 79 L. Ed. 2d 790 (1984), or creates "continuing obligations" between himself and its residents. *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 648, 70 S. Ct. 927, 94 L. Ed. 1154 (1950). In return for taking advantage of the forum state's "benefits and protections," the defendant must submit to the burden of being sued there. *Burger King*, 471 U.S. at 475-76.

A defendant "purposefully directs" activity at a forum state when he: (1) commits an intentional act, that is (2) expressly aimed at the forum state, and that (3) causes harm that he knows is likely to be suffered in that jurisdiction. *See Schwarzenegger*, 374 F.3d at 803 (citing *Calder v. Jones*, 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984)). Under this "effects test," it is not sufficient that the defendant took action with a foreseeable effect in the forum state. *Id.* at 804-05. He must do "something more" for courts to conclude that he "expressly aimed" activity at the forum, such as individually targeting its residents. *Id.* at 805; *Pebble Beach* Co., 453 F.3d at 1157.

In my view, Hansing did not purposefully avail himself of California. Hansing created no continuing obligations to California residents by selling his car on eBay. His only obligation was to complete the sale with the highest bidder, whoever and wherever he might be, which Hansing fulfilled by allowing Boschetto to retrieve the car in Janesville, Wisconsin. Nor did Hansing's eBay auction establish a substantial connection between himself and California such that he invoked the benefits and protections of its laws. There is no suggestion that he is engaged in ongoing business activities there,[1] and though a Californian ultimately

made the highest of fifty bids, this was a fortuity; Boschetto does not argue either that Hansing had any control over the high bidder's location within the United States, or that the high bidder's residence had any effect on Hansing's obligations, given Hansing's requirement that the high bidder either pick up the car in Wisconsin or, as Boschetto did, arrange for a third-party to ship it somewhere else. *World-Wide Volkswagen Corp.*, 444 U.S. 286, 297-99, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980) ("the foreseeability that is critical to [the] due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.") (citations omitted).

I also do not think that Hansing purposefully directed any activity at California. Boschetto argues that Hansing directed his eBay auction at the state by failing to bar Californians from bidding. By accepting bids from all states, he contends, Hansing offered to sell the subject vehicle to residents of each state of the union, including California. I disagree that allowing eBay users throughout the United States and Canada to bid on an auction subjects the seller to nationwide jurisdiction. As we have previously held, merely advertising over the Internet is not sufficient to confer jurisdiction throughout the United States, even though the advertisement or website at issue may be viewed nationwide. *Pebble Beach Co.*, 453 F.3d at 1157-58; *Cybersell*, Inc, 130 F.3d at 419-20.[2] The defendant must do "something more" to aim activity expressly at a state, *Cybersell*, 130 F.3d at 418, 419; Pebble Beach Co., 453 F.3d at 1156-57,[3] and Boschetto has not shown

either that Hansing tailored his auction to the residents of any state in particular, or that he sent or advertised his auction to any state in particular, much less California.[4] Arguably, Hansing could foresee that California residents would bid on his auction, and that he would benefit from their participation, but foreseeable participation by Californians is not enough. Hansing must have done something more to aim his auction expressly at the state, such as individually targeting California residents.[5] *Pebble Beach Co.*, 453 F.3d at 1157. On the facts of this case, he did nothing more. He simply permitted those with eBay access throughout the United States and Canada to bid on his car, agreeing to let the winner retrieve it in Janesville, Wisconsin.

Accordingly, although Hansing listed his car for sale in an unrestricted eBay auction, allowing residents of all states to view the auction and bid, and though he ultimately sold the car to a California resident, he neither availed himself of the privilege of doing business in California nor purposefully directed any activity at the state.[6]

I agree that the district court did not abuse its discretion by denying Boschetto jurisdictional discovery. Where, as here, a plaintiff's claim of personal jurisdiction is both attenuated and based on bare allegations rebutted by specific denials made by the defendants, the district court need not permit even limited discovery. *Pebble Beach Co.*, 453 F.3d at 1160.

Footnotes

1There is no basis for concluding that Hansing is engaged in extensive business activity on the Internet, with California or any other forum. *See Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 419-20 (9th Cir. 1997). Although Boschetto points to *Stomp, Inc. v. NeatO, LLC*, 61 F.Supp.2d 1074, 1077 (C.D. Cal. 1999), I do not accept its suggestion that conducting any business over the Internet subjects a defendant to suit nationwide.

2Boschetto argues that Hansing should not be allowed to take advantage of modern technology while simultaneously escaping traditional notions of jurisdiction. However, we rejected this precise argument in *Cybersell*. 130 F.3d at 419. Haling Hansing into California would be inconsistent with traditional notions of jurisdiction. In any event, I am not persuaded by Boschetto's characterization of Hansing's use of the Internet to sell his car as "taking advantage." Allowing sellers to hold nationally available auctions without requiring them to submit to jurisdiction nationwide is beneficial to buyers as well. A less-burdensome jurisdictional rule encourages sellers to hold auctions in the first place, thereby creating opportunities for buyers to find items they want and to decide for themselves whether -- taking all relevant matters into account -- they want to place a bid.

3*See also Rio Properties, Inc. v. Rio Int 'l Interlink*, 284 F.3d 1007, 1020 (9th Cir. 2000) (no jurisdiction based on passive website without "something more"); *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1320 (9th Cir. 1998) (posting website on internet does not establish jurisdiction nationwide); and *Schwarzenegger*, 374 F.3d at 806-07 (foreseeable effect of Ohio print advertisement in California did not render

advertisement "expressly aimed" at California); *cf. Bancroft*, 223 F.3d at 1084 (letter to domain registrar, which interfered with plaintiff's use of registered domain, independently targeted plaintiff); and *Metropolitan Life Ins. Co. v. Neaves*, 912 F.2d 1062, 1065 (9th Cir. 1990) (fraudulent letter sent to plaintiff in forum state was express aiming).

4Even if Hansing knew Boschetto was in California when he sent the post-auction email, the email was not sufficient to subject him to personal jurisdiction there. It established only a limited contact, and Hansing sent it because Boschetto won the auction, not because he was in California. *See Burger King Corp.*, 471 U.S. at 474.

5Nor did Hansing purposefully avail himself of the benefits and protections of California by allowing Californians to bid. His auction did not create a substantial connection with the forum, and nothing in the record indicates that it made any difference to Hansing where the winning bidder resided (within the United States or Canada) or where he took the car when it left Wisconsin. *World-Wide Volkswagen*, 444 U.S. at 295-97 (no jurisdiction over auto distributor based on customer's decision to drive to the forum state).

6This is consistent with the approach of the majority of courts to address whether listing an item for nationwide sale on eBay requires a seller to submit to suit nationwide. *See e.g. Winfield Collection, Ltd. v. McCauley*, 105 F.Supp.2d 746, 749 (E.D. Mich. 2000) (eBay sales are random and attenuated); *Metcalf v. Lawson*, 148 N.H. 35, 802 A.2d 1221, 1226 (N.H. 2002)

(seller had no control over ultimate winner); *Karstetter v. Voss*, 184 S.W.3d 396, 405 (Tex. Ct. App. 2006) (contact with Kansas was random, isolated and fortuitous); *Action Tapes, Inc. v. Ebert*, 2006 U.S. Dist. LEXIS 4958 (N.D. Tex. 2006) (eBay sellers do not control interactivity of eBay site); *United Cutlery Corp. v. NFZ, Inc.*, 2003 U.S. Dist. LEXIS 21664 (D. Md. 2003) (intent was to sell to highest bidder, irrespective of location); *Gossett v. HBL, LLC*, 2006 U.S. Dist. LEXIS 30435, 2006 WL 1328757, *2 (D.S.C. 2006) ("mere listing on eBay is not enough to invoke jurisdiction . . . ."); and *Sayeedi v. Walser*, 15 Misc. 3d 621, 2007 WL 623521 (N.Y.C. Civ. Ct. 2007) (ultimate destination of eBay item completely determined by bidders).

No C-06-1390 VRW

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

PAUL BOSCHETTO,
Plaintiff,

v

JEFFREY D HANSING, FRANK BOUCHER
CHRYSLER DODGE-JEEP, GORDIE BOUCHER
FORD and BOUCHER AUTOMOTIVE GROUP,
Defendants.

July 17, 2006, Filed

JUDGMENT IN A CIVIL CASE

IT IS ORDERED AND ADJUDGED that pursuant to the court's order Jeffrey Hansing and the Wisconsin dealerships' motions to dismiss, judgment is entered for the defendants.

No C-06-1390 VRW

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

PAUL BOSCHETTO,
Plaintiff,

v

JEFFREY D HANSING, FRANK BOUCHER
CHRYSLER DODGE-JEEP, GORDIE BOUCHER
FORD and BOUCHER AUTOMOTIVE GROUP,
Defendants.

July 13, 2006, Filed

JUDGES: VAUGHN R WALKER, United States District Chief Judge.

ORDER

The complaint alleges a scenario that as far as the court can discern has been little dealt with in the published case law but which is bound to recur, perhaps with some frequency, in the years ahead. Plaintiff Paul Boschetto, a California resident, brought this diversity action against Wisconsin resident Jeffrey D Hansing and various Wisconsin car dealerships, Doc # 1 (Compl), ¶¶ 1-4, alleging, inter alia, that Hansing committed breach of contract and fraud by selling plaintiff a defective 1964 Ford Galaxie in an Internet auction on eBay.com. Hansing and the Wisconsin dealerships have separately moved to dismiss this case under FRCP

12(b)(2) for lack of personal jurisdiction. Doc ## 4, 9. For the reasons stated below, the court GRANTS both motions.

I

On August 1, 2005, plaintiff alleges that Hansing posted a 1964 Ford Galaxie for auction on eBay.com and that Hansing advertised the car as an "R Code" in "awesome condition," "recently rebuilt" and "ready to be driven." Compl, ¶ 6. Plaintiff contends that he relied on this description when submitting a bid of $ 34,106 and that eBay later notified him that his bid had succeeded. Id, ¶¶ 7, 8. After plaintiff paid for the car, Hansing instructed him by email that he could pick it up from Frank Boucher Chrysler Dodge Jeep, the Wisconsin dealership where Hansing worked. Id, ¶¶ 5, 10. Frank Boucher Chrysler Dodge Jeep and the other defendant dealerships apparently constitute a single automotive group. Doc # 9-2, ¶ 2. Plaintiff hired a delivery company to transport the vehicle to California and received it on September 15, 2005. Compl, ¶¶ 11-12. Plaintiff then discovered that the vehicle was defective and was not an "R Code" as advertised. Id, ¶ 12.

II

A plaintiff has the burden of establishing that the court has personal jurisdiction over a defendant. *Doe v Unocal Corp*, 248 F.3d 915, 922 (9th Cir 2001). In assessing a plaintiff's showing, the court may consider evidence presented in affidavits and other evidence procured during discovery. But when the court acts on the motion without holding an evidentiary hearing, as here, the plaintiff need only make a prima facie showing

of jurisdictional facts to withstand the motion to dismiss. Id. When not directly controverted, plaintiff's version of the facts must be taken as true and conflicts between the facts contained in the parties' affidavits should be resolved in favor of plaintiff. Id. The facts here are not in material dispute.

A federal court may exercise personal jurisdiction over a defendant when such jurisdiction comports with the law of the state in which the court sits and with the requirements of due process. *Lee v City of Los Angeles*, 250 F.3d 668, 692 (9th Cir 2001). "California [law] permits the exercise of personal jurisdiction to the full extent permitted by due process." *Bancroft & Masters, Inc.. v. Augusta Nat'l, Inc..*, 223 F.3d 1082, 1086 (9th Cir 2000); Cal Code Civ Pro § 410.10. Due process requires a defendant to have certain minimum contacts with the forum state so that permitting the suit would not offend "traditional notions of fair play and substantial justice." *Int'l Shoe Co v Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945) (quoting *Milliken v Meyer*, 311 U.S. 457, 463, 61 S. Ct. 339, 85 L. Ed. 278 (1940)) (internal quotation marks omitted). A defendant's "conduct and connection with the forum state" must be such that the defendant "should reasonably anticipate being haled into court there." *World-Wide Volkswagen v Woodson*, 444 U.S. 286, 297, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980).

General jurisdiction is a type of personal jurisdiction that exists when a defendant has substantial or continuous and systematic contacts with the forum state. *Bancroft & Masters*, 223 F.3d at 1086. When such contacts exist, a defendant may be haled into court in that state "in any action, even if the action is unrelated

to those contacts." Id. The standard for establishing general jurisdiction is "'fairly high,' and requires that the defendant's contacts be of the sort that approximate physical presence." Id (quoting *Brand v Menlove Dodge*, 796 F.2d 1070, 1073 (9th Cir 1986)) (citation omitted).

Absent general jurisdiction, a court still may exercise specific jurisdiction. The Ninth Circuit has established a three-prong test for establishing specific jurisdiction:

> (1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
>
> (2) [T]he claim must be one which arises out of or relates to the defendant's forum related activities; and
>
> (3) [T]he exercise of jurisdiction must comport with fair play and substantial justice, ie it must be reasonable.

Schwarzenegger v Fred Martin Motor Co., 374 F.3d 797, 802 (9th Cir 2003). Although plaintiff bears the burden of establishing the first two prongs, defendant bears the burden on the third prong. See id.

A

Plaintiff argues the court may have general jurisdiction

over Hansing if discovery shows that he previously sold other cars to California residents. Doc # 17-1 at 5. Although plaintiff does not contest the Wisconsin dealerships' assertions that they are not incorporated in California and have never sold an automobile there (Doc # 9-2, ¶¶ 4, 11), he nonetheless suggests that the dealerships' website might be sufficient to establish general jurisdiction over them. Doc # 16-1 at 6.

Plaintiff's general jurisdiction arguments fail to persuade. Plaintiff admits that he "has no direct knowledge" whether either the Dealership or Hansing have 'continuing or systematic' contacts with the State of California." Id. Even if plaintiff could demonstrate past sales by Hansing to California, occasional sales to California residents are insufficient to create general jurisdiction. See *Brand*, 796 F.2d at 1073. And plaintiff has not marshaled any evidence to contest the Wisconsin dealerships' assertion that they have never conducted any business in California via their website. Doc # 9-2, ¶ 11. Accordingly, plaintiff has not satisfied the fairly high burden for establishing general jurisdiction.

B

Plaintiff's better argument, of course, is that the court may exercise specific jurisdiction over Hansing because he contracted to sell a car to a California resident. Doc # 17-1 at 6. Further, plaintiff asserts that Hansing acted as the Wisconsin dealerships' agent and employee in selling the car, thereby permitting the court to exercise jurisdiction over them. Doc # 16-1 at 8; Compl, ¶ 5. Hansing's actions form the only asserted basis for exercising specific jurisdiction over the Wisconsin

dealerships. This argument need not long detain us. Even if Hansing acted as an agent, which the dealerships dispute, he did not as will presently be explained, purposefully direct his actions toward California. Without that showing, the court cannot exercise jurisdiction over the Wisconsin dealerships.

Plaintiff argues that the Ninth Circuit's decision in *Data Disc, Inc. v Sys. Tech. Assocs.*, 557 F.2d 1280 (9th Cir 1977), militates in favor of finding personal jurisdiction over Hansing. Doc # 17-1 at 6. But *Data Disc* is hardly instructive here. In that case, the court found personal jurisdiction because "at least some of the negotiations took place at the Data Disc plant in Sunnyvale, California * * *." *Id.* at 1284. To the contrary here, negotiations in this case took place only over the Internet and never physically occurred in California.

The parties do not indicate, nor has the court discovered, any California or Ninth Circuit case law addressing the propriety of exercising specific jurisdiction over a nonresident defendant based on a single online auction sale to a resident of the forum state. But generally, "the likelihood that personal jurisdiction can be constitutionally exercised [over an entity with a website] is directly proportionate to the nature and quality of commercial activity that [the] entity conducts over the Internet." *Cybersell, Inc. v Cybersell, Inc.*, 130 F.3d 414, 419 (9th Cir 1997) (quoting *Zippo Mfg. Co. v Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (WD Pa 1997)). This activity ranges from "a broad spectrum of Internet use on the one hand, and contacts with the forum on the other." *Id.* at 417. Here, of course, the issue is not whether the court has personal jurisdiction over the intermediary eBay but

whether it has personal jurisdiction over an individual who conducted business over eBay. Nonetheless, *Cybersell* provides a useful framework for determining whether Hansing's use of eBay constitutes sufficient minimum contacts with California to justify exercising personal jurisdiction.

In defining whether the defendant had sufficient minimum "contacts with the forum," *Cybersell* relies on *CompuServe, Inc. v Patterson*, 89 F.3d 1257 (6th Cir 1996). There, the Sixth Circuit found jurisdiction over defendant Patterson proper because he "electronically transmitted thirty-two master software files to CompuServe, which CompuServe stored and displayed to its subscribers. * * * In effect, Patterson used CompuServe as a distribution center to market his software." *Cybersell*, 130 F.3d at 417 (summarizing *CompuServe*, 89 F.3d at 1264). Additionally, the relationship "was intended to be ongoing in nature; it was not a 'one-shot affair.'" *Compuserve*, 89 F.3d at 1265.

In the present case, Hansing's contacts with the forum state are not nearly as repetitive or comprehensive as were Patterson's contacts in *Compuserve*. Although Hansing used eBay to market the automobile, eBay acted not as a "distribution center" but rather as a virtual forum for the exchange of goods. And the relationship between plaintiff and Hansing was exactly a "one-shot affair." While eBay is headquartered in California, this contact is irrelevant because this dispute only involves two eBay users and not eBay itself.

Exercising personal jurisdiction would be improper

here because Hansing's actions were not purposefully directed at the forum state. Auction sales on eBay are "random" and "attenuated," and "the choice of [the] highest bidder is * * * beyond the control of the seller;" hence, an overwhelming majority of courts have held that an eBay seller does not purposefully avail himself of the privilege of doing business in a forum state absent some additional conduct directed at the forum state. See *Winfield Collection, Ltd. v McCauley*, 105 F. Supp. 2d 746, 749 (ED Mich 2000); *Metcalf v Lawson*, 148 N.H. 35, 802 A.2d 1221 (NH 2002) (finding no personal jurisdiction over an eBay seller with no control over the ultimate winner and no ability to exclude buyers from specific jurisdictions); *Karstetter v Voss*, 184 S.W.3d 396 (Tex Ct App 2006) (finding no personal jurisdiction over an eBay seller who rejected a buyer's offer to preempt the auction and instead let the bidding process conclude), *Action Tapes, Inc. v Ebert*, 2006 U.S. Dist. LEXIS 4958 (ND Tex 2006) (finding no personal jurisdiction over an eBay seller where the traditional auction process was not altered or circumvented in any manner); *United Cutlery Corp. v NFZ, Inc.*, 2003 U.S. Dist. LEXIS 21664 (D Md 2003) (finding no personal jurisdiction over an eBay seller whose manifested intent was to sell to the highest bidder).

Although research did indicate two opinions that diverge from the prevailing view, their analyses do not persuade the court. In *Malcolm v Esposito*, the dispute arose from a single eBay sale to a Virginia resident. 2003 Va. Cir. LEXIS 257, 63 Va Cir 440, 446 (Va Cir Ct 2003). Nonetheless, the court found jurisdiction proper because defendants were commercial sellers with 213 sales on eBay and who represented that they had local,

national and international eBay customers. Id.

This case is distinguishable because plaintiff does not allege that Hansing or the Wisconsin dealerships conducted business over eBay with any frequency. To the contrary, plaintiff marshaled no evidence to contest the dealerships' assertion that they have never conducted business in California via the Internet. Doc # 9-2, ¶ 11.

In *Tindall v One 1973 Ford Mustang*, the dispute again arose from a single eBay sale. 2006 U.S. Dist. LEXIS 29621, 2006 WL 1329168, *1 (ED Mich 2006). The court found jurisdiction proper because in "selling the car to a Michigan resident, Defendants have transacted business in the state, giving this Court personal jurisdiction over them * * *." 2006 U.S. Dist. LEXIS 29621, [WL] at *4.

While more factually analogous to this case, *Tindall* is not persuasive because the court provided no reasoning to support its aforementioned conclusion. While other courts at least recognize that the Internet and particularly an eBay transaction may alter the jurisdictional analysis, the *Tindall* court seemingly analogized the situation to a "phone call or written correspondence to the forum." Id (quoting *GMC v Ignacio Lopez de Arriortua*, 948 F. Supp. 656, 663 (ED Mich 1996)). The analogy is flawed because phone calls and written correspondence by nature must be specifically targeted to a resident of the forum, while an advertisement on eBay lacks such focus.

Looking to whether Hansing engaged in some additional conduct directed at the forum, the court finds

that plaintiff has alleged none. Only after the auction and alleged fraud had been committed did Hansing learn that the car was California-bound and did he email plaintiff regarding delivery. Accordingly, the "nature and quality" of Hansing's conduct over the Internet are insufficient to permit exercising personal jurisdiction in California. Significantly, plaintiff -- not Hansing -- made the arrangements for pick-up of the vehicle in Wisconsin and dispatched the shipper to that state. Unlike the usual eBay transaction in which the seller arranges for shipment and sets in motion the events that land the product in the buyer's locale, this case is different.

This fact alone, although important enough, does not warrant finding that the court lacks personal jurisdiction over Hansing. Perhaps a greater significance lies in what too easy a test of personal jurisdiction could do to Internet commerce of the kind involved here. Assume an eBay seller would be subject to personal jurisdiction simply by consigning an item to eBay that is bought by some denizen of a faraway forum. The friction on e-commerce of such a rule would slow the flow of transactions -- perhaps significantly. No doubt, Boschetto suffers considerable inconvenience in going to Wisconsin to assert his claim. But he bought the car knowing it was in Wisconsin and chose to do so without an inspection by himself or a third party who could have been engaged for that purpose. Under the facts here, due process suffers no offense by holding that this court lacks personal jurisdiction over defendants.

C

Plaintiff alternatively requests that "limited discovery be allowed to determine whether Hansing had sufficient contacts to form the basis for jurisdiction" (Doc # 17-1 at 7-8) and "to determine whether Hansing was acting as either the actual or ostensible agent for [the] dealership" (Doc # 16-1 at 9). The court has broad discretion to permit or deny discovery to determine whether personal jurisdiction exists. See *Data Disc*, 557 F.2d at 1285 n1. Here, plaintiff merely speculates without any support that discovery might allow him to demonstrate that jurisdiction in California is proper. The court therefore DENIES plaintiff's request for discovery.

III

Accordingly, the court GRANTS Hansing's motion to dismiss (Doc # 4) and the Wisconsin dealerships' motion to dismiss (Doc # 9). The clerk is DIRECTED to CLOSE the file and TERMINATE all pending motions.

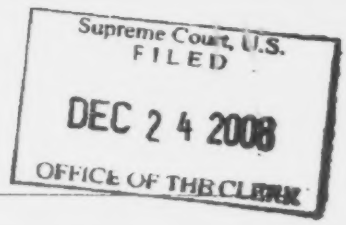
IT IS SO ORDERED.

VAUGHN R WALKER

United States District Chief Judge

5

No: 08-686



IN THE

SUPREME COURT OF THE UNITED STATES

PAUL BOSCHETTO, PETITIONER

v.

JEFFREY D. HANSING, FRANK BOUCHER CHRYSLER DODGE JEEP, GORDIE BOUCHER FORD AND BOUCHER AUTOMOTIVE GROUP, RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT GORDIE BOUCHER FORD LINCOLN-MERCURY OF JANESVILLE, INC.'S BRIEF IN OPPOSITION

TIMOTHY C. DAVIS
Counsel of Record
JOSE A. CORDOVA
THE DAVIS LAW FIRM
625 Market Street, 12th Floor
San Francisco, California 94105
(415) 278-1400

Attorneys for Respondent

GORDIE BOUCHER FORD LINCOLN- MERCURY OF JANESVILLE, INC.; sued herein as Frank Boucher Chrysler Dodge-Jeep and Gordie Boucher Ford; and Boucher Automotive Group

QUESTIONS PRESENTED

1. Whether the sale of an item through eBay provides the requisite "minimum contacts" to support personal jurisdiction over a non-resident defendant in the buyer's forum state?

2. Whether "purposeful availment" can be found utilizing the "effects test" enunciated in *Calder v. Jones*, 465 U.S. 783 (1984) to confer jurisdiction over the seller of merchandise through the Internet auction site, such as eBay, where it is alleged that the seller committed tortious act in the forum state arising from the transaction?

CORPORATE DISCLOSURE STATEMENT

Respondent GORDIE BOUCHER FORD LINCOLN-MERCURY OF JANESVILLE, INC., sued herein as FRANK BOUCHER CHRYSLER DODGE-JEEP and GORDIE BOUCHER FORD, states that it is a Wisconsin corporation, with no parents or subsidiaries, and that no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i
CORPORATE DISCLOSURE STATEMENT ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES v
OPINION BELOW 1
JURISDICTION 1
RELEVANT PROVISIONS INVOLVED 1
STATEMENT OF THE CASE 2
STATEMENT OF FACTS AND PROCEDURAL BACKGROUND 3
REASONS FOR DENYING BOSCHETTO'S WRIT OF CERTIORARI 6

A. Review Is Not Warranted Because This Case Does Not Fall Within The Parameters of SUPREME COURT RULE 10 8

B. The Jurisdictional Issues Presented By Boschetto Are Not Unsettled And This Court's Past Precedents Have Conclusively Addressed The Issue Central To This Dispute 10

1. Existing Law Has Established That Selling An Item Through An eBay Auction Does Not Constitute 'Purposeful Availment' Of The Forum State Where The Highest Bidder Happens To Reside 13

C. The Fact That The Ninth Circuit Did Not Apply The "Effects Test" To Its Personal Jurisdiction Analysis Does Not Warrant Review By This Court.....19

1. Contrary To Boschetto's Assertions, The Application of The "Effects Test" To This Case Is Of No Consequence Because It Does Not Lead To A Finding of Personal Jurisdiction 20

D. The "Sliding Scale" Test Developed In The *Zippo* Case And Discussed By Boschetto In His Petition For Certiorari Is Not Applicable To The One-Time Sale Of An Item On eBay By A Non-Commercial Seller And Only Serves To Confuse The Issues 26

E. The Exercise of Jurisdiction Over Boucher Ford Would Be Unreasonable.....30

CONCLUSION 31

TABLE OF AUTHORITIES

Page

Cases

Action Tapes, Inc. v. Ebert
2006 WL 305769 (N.D.Tex. 2006) 16

Action Tapes, Inc. v. Weaver
2005 WL 3199706 (N.D.Tex. 2005) 16, 26, 27

ALS Scan, Inc. v. Digital Service Consultants, Inc.
293 F.3d 707 (4th Cir. 2002)..... 25, 26

Asahi Metal Industry Co., Ltd. v. Superior Court
480 U.S. 102 (1987)..... 30

AT&T Corp. v. City of Portland
216 F.3d 871 (9th Cir. 2000)..... 13

Burger King Corp. v. Rudzewicz
471 U.S. 462 (1985)..... 11, 12, 16, 21

Calder v. Jones
465 U.S. 783 (1984)..... *i*, 7, 19, 20

Compuserv, Inc. v. Patterson
465 U.S. 783 (1984)..... 24

Dedvukaj v. Maloney
89 F.3d 1257 (6th Cir. 1996)..... 17, 18

Digital Equip. Corp. v. AltaVista Technology, Inc.
960 F.Supp. 456 (D. Mass. 1997)..... 28, 29

Dudnikov v. Chalk Vermillion Fine Arts, Inc.
514 F.3d 1063 (10th Cir. 2008)..... 22

Fletcher Jones West Shara v. Rotta
919 So.2d 685 (Fla.App.3 Dist. 2006)..... 23, 25, 26

Ginsburg v. Dinicola
2007 WL 1673533 (D. Mass 2007)..... 17, 27, 28

Gorman v. Ameritrade Holding Corp.
293 F.3d 506 (D.C. Cir. 2002)..... 13, 29, 30

Gossett v. HBL, LLC
2006 WL 1328757 (D. S.C. 2006) 14

International Shoe Co. v. Washington
326 U.S. 310 (1945)..... 12

Internet Doorway, Inc. v Parks
138 F.Supp.2d 773 (S.D. Miss. 2001) 24, 25

McGuire v. Lavoie
2003 WL 23174753 (N.D.Tex.,
Aug. 19, 2003) 17, 18, 22, 23, 25, 27

Metcalf v. Lawson
148 N.H. 35 (2002)..... 14, 27

Pebble Beach Co. v. Caddy
453 F.3d 1151, 1155 (9th Cir. 2006)..... 21, 22, 25

People v. Lipsitz
663 N.Y.S.2d 468 (1997) 28

Ratchford v. Gay Lib
434 U.S. 1080 (1978)..... 10

Sayeedi v. Walser
2007 WL 623521 (N.Y. City Civ. Ct.,
Feb. 27, 2007)..... 14, 15

Schwarzenegger v. Fred Martin Motor Co.
374 F.3d 797, 802 (9th Cir. 2003)..... 21

Shaffer v. Heitner
433 U.S. 186 11

Ticor Title Ins. Co. v. Brown
511 U.S. 117 (1994) 7, 9

United Cutlery Corp. v. NFZ, Inc.
2003 WL 22851946 (D.Md. 2003) 15

Verizon Online Services v. Ralsky
203 F.Supp.2d 601 (E.D. Va. 2002) .. 23, 24, 25, 26

Winfield Collection, Ltd. v. McCauley
105 F.Supp.2d 746 (E.D.Mich. 2000) 15, 16

World-Wide Volkswagen v. Woodson
444 U.S. 286, 297 (1980) 12, 21

Zippo Mfg. Co. v. Zippo Dot Com, Inc.
952 F. Supp. 1119, 1124
(W.D. Pa. 1997) 7, 8, 26, 27, 28, 29, 30

Statutes

28 U.S.C. Section 1254(1) 1
Cal. Civ. Code Section 1750 2

Rules

Federal Rule of Civil Procedure 12(b)(2) 1, 2
SUPREME COURT RULE 10 ..... 10, 11, 20

Other Authorities

Gressman, Geller et al., SUPREME COURT PRACTICE (9th ed. 2007) 279 ..... 8, 17

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is dated August 20, 2008 and is a published decision.

The order of the United States District Court, for the Northern District of California is dated July 17, 2006 and is a published decision.

JURISDICTION

Petitioner Paul Boschetto has invoked this Court's jurisdiction under 28 U.S.C. § 1254(1).

The Ninth Circuit Court of Appeal's opinion was rendered on August 20, 2008.

RELEVANT PROVISIONS INVOLVED

Federal Rule of Civil Procedure 12(b)2.

STATEMENT OF THE CASE

This case arises from the sale of a vehicle by an individual Wisconsin resident (Defendant Jeffrey Hansing ("Hansing")) to an individual California resident (Petitioner Paul Boschetto ("Petitioner or "Boschetto")) via an Internet auction. The on-line auction was conducted through the website of third party e-Bay. Although the vehicle in question was owned by Hansing, Boschetto alleges that Defendant Hansing made the sale within the course and scope of his employment with Respondent Gordie Boucher Ford Lincoln-Mercury of Janesville, Inc. ("Boucher Ford").

On February 26, 2006, Boschetto filed his Complaint for Damages, alleging causes of action for violation of the Consumer Legal Remedies Act (Cal. Civ. Code Section 1750, et seq.), Breach of Contract, Misrepresentation, and Fraud.

Hansing and Boucher Ford each filed Motions to Dismiss for Lack of Personal Jurisdiction pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure. Defendant Hansing filed his Motion to Dismiss on March 27, 2006, and Respondent Boucher Ford filed its Motion to Dismiss on March 30, 2006. Petitioner Paul Boschetto opposed both Motions on substantive grounds, and alternatively requested leave to conduct additional discovery on the issue of jurisdiction.

On July 17, 2006, the District Court granted both Motions and issued an Order of Dismissal of all claims against all parties. Petitioner Paul Boschetto

appealed the District Court's Order of Dismissal to the Ninth Circuit Court of Appeals. The Ninth Circuit issued an opinion on August 20, 2008 affirming the District Court's order of Dismissal. In reaching its conclusion, the Ninth Circuit applied traditional jurisdiction analysis to the facts before it, and noted that the fact that eBay was used as the conduit for the sale of the vehicle did not affect the jurisdictional outcome.

The Ninth Circuit's ruling was correct, and there are no grounds that warrant the granting of Petitioner Paul Boschetto's Writ of Certiorari.

STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

This action arises out of the sale of an automobile on eBay, an Internet auction website. Hansing, a Wisconsin resident, listed a motor vehicle (a 1964 Ford Galaxy) for sale. Petitioner Boschetto, a resident of California, succeeded at being the highest bidder when the eBay auction ended and purchased the vehicle from Hansing. After purchasing the vehicle, Boschetto claims he discovered problems with it and initiated this lawsuit in California seeking to rescind the sale with Hansing.

Boucher Ford is a motor vehicle dealership incorporated in the State of Wisconsin, with its principal place of business in Janesville, Wisconsin.

Boucher Ford is neither incorporated in nor qualified to do business in the State of California. It has no subsidiaries or related companies incorporated or qualified to do business in California, and its officers and directors neither reside nor are domiciled in California.

Boucher Ford, a Wisconsin business, has no employees residing or domiciled in California; nor has it contracted with persons residing in California to act on its behalf with respect to marketing, distributing or servicing any of its goods or products. Boucher Ford has no branch office or comparable facilities in California, and has no telephone listings or mailing address in California. Boucher Ford has no bank accounts or other tangible personal or real property in California.

Boucher Ford does *not* direct any of its advertising into California, and does not advertise in any publications that are directed primarily toward California residents. No meetings of its board of directors or shareholders have been held in California, and none of its officers or directors have attended business conferences or similar functions within California. Boucher Ford has never sold an automobile in California, by way of the Internet or any other means of commerce, nor has it ever delivered an automobile to California for any purpose.

In brief, Boucher Ford has no contacts with the forum state (California).

Much like Petitioner Boschetto's Ninth Circuit Opening Brief, his Writ of Certiorari lumps together Hansing and Boucher Ford and refers to them collectively as "Defendants."[1] Hansing and Boucher's interest are not aligned, they are separate parties and must be treated as such. The District Court's Order dismissing the case, later affirmed by the Ninth Circuit clearly differentiated between the two. Boucher Ford did *not own or sell* the subject vehicle to Boschetto and Boucher Ford's only connection to this lawsuit and sale is that Hansing happened to be an employee of Boucher Ford.

The automobile which is the subject of this lawsuit was personally owned by Hansing, and Hansing personally advertised the vehicle for sale on eBay. The vehicle was never owned or advertised for sale by Boucher Ford, and it received no money whatsoever from the sale. Following the sale of the vehicle to Boschetto, and as a convenience to him, Hansing directed Boschetto to pick up the vehicle from Hansing's workplace at Boucher Ford. However, Boucher Ford did not authorize the transaction or permit its Janesville, Wisconsin, facilities to be used for this purpose.

---

[1] Petitioner erroneously named three other Defendants in his Complaint: "Frank Boucher Chrysler Dodge-Jeep," "Gordie Boucher Ford" and "Boucher Automotive Group."

On July 17, 2006, the United States District Court for the Northern District of California granted both Hansing and Boucher Ford's respective Motions to Dismiss for Lack of Personal Jurisdiction because of each party's lack of contacts with California. The District Court issued an Order dismissing the lawsuit on the grounds that the District Court of California lacked personal jurisdiction over Hansing and Boucher Ford. Petitioner Boschetto appealed the District Court's Order of Dismissal to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit issued an opinion on August 20, 2008 affirming the District Court's Order of Dismissal.

REASONS FOR DENYING BOSCHETTO'S WRIT OF CERTIORARI

Boschetto's Writ of Certiorari should be denied because this case does not fall within the parameters of SUPREME COURT RULE 10(C). Contrary to Boschetto's assertions, the United States Ninth Circuit Court of Appeals did not decide an important question of federal law that remains unsettled for this Court.

The lower courts have consistently and successfully applied traditional notions of personal jurisdiction to transactions accomplished through the use of Internet activities such as interactive websites, and specifically, eBay auctions. These

courts have concluded that the usual on-line auction process do not give rise to the "purposeful conduct" required for personal jurisdiction.

Boschetto's Writ of Certiorari should also be denied because his argument that the Ninth Circuit Court of Appeals erred in failing to apply the "effects test" set forth by this Court in *Calder v. Jones*, 465 U.S. 783 (1984) is not grounds for a Writ of Certiorari. This Court does not grant certiorari simply to correct an alleged error in a court of appeals' decision. *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 122 (1994). In fact, "[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." SUPREME COURT RULE 10.

Furthermore, Boschetto's claim that the Ninth Circuit erred in failing to use the *Calder* "effects test" is of no consequence because applying the test would not have changed the court's analysis or decision. The *Calder* test would not have led the court below to find that Boucher Ford had the requisite "minimum contacts" with California because there is no evidence that Boucher Ford purposefully directed any activity to California.

The same holds true for Boschetto's arguments pertaining to the applicability of the "sliding scale" analysis set forth in *Zippo Mfg. Co. v. Zippo Dot Com*, 952 F. Supp.1119 (W.D. Pa. 1997) and the "variant"

results produced by the application of this test. *Petition*, p. 10-13. Boschetto continues to ignore the fact that the sliding scale analysis is inapplicable to cases in which an individual seller uses the eBay auction website to sell a single personal item. Finally, Boschetto offers no authority to support his argument that the use of the sliding scale analysis by the lower courts has created "differing views" of personal jurisdiction.

In the present case, the Ninth Circuit made a correct decision that is a restatement of "settled law" that makes review on certiorari "patently inappropriate." Gressman, Geller et. al. SUPREME COURT PRACTICE (9th ed. 2007) 279.

A. Review Is Not Warranted Because This Case Does Not Fall Within The Parameters of SUPREME COURT RULE 10

Review on a Writ of Certiorari is not a matter of right, but of judicial discretion, and will only be granted for compelling reasons. SUPREME COURT RULE 10. This Court generally considers the following criteria in deciding whether to grant certiorari:

(1) Whether a conflict exists between a court of appeals' decision and a decision by a state's highest court;

(2) Whether a court of appeals has departed drastically from the accepted and usual course of judicial proceedings;

(3) Whether the state court of last resort has decided a federal question in conflict with another state court of last resort;

(4) Whether a court of appeals decision conflicts with a Supreme Court decision;

(5) Whether a decision involves an important federal question that should be settled by the Supreme Court.

SUPREME COURT RULE 10.

The Court will not grant certiorari simply to correct an error in a court of appeals decision. *Id.*, *see also Ticor Title Ins. Co. v. Brown*, 511 U.S. at 122. This is what Boschetto is asking this Court to do.

Here, Boschetto's main argument for certiorari is that the issue decided by the Ninth Circuit Court of Appeals is a question of federal law that should be settled by this Court. Boschetto does not assert any pertinent conflicts, drastic departures from judicial proceedings of the lower courts, or identify any compelling reasons as grounds for his petition, which should be denied.

B. The Jurisdictional Issues Presented By Boschetto Are Not Unsettled And This Court's Past Precedents Have Conclusively Addressed The Issue Central To This Dispute

Boschetto's core argument is that certiorari should be granted because the Ninth Circuit Court of Appeals has decided an important question of federal law that has not been, but should be settled by this Court. To support his argument, Boschetto asserts that Federal and State appellate courts have issued "variant" views on personal jurisdiction. *Petition*, p. 10-13.

The standard by which this Court determines whether it should grant certiorari to address a question of federal law that "should be settled" is found in SUPREME COURT RULE 10 (C). In *Ratchford v. Gay Lib*, 434 U.S. 1080 (1978), this Court established that a question of law "should be settled" by this Court only when the Court's past precedents "do not conclusively address the issues central to th[e] dispute." *Id.* at 1082. This is not the case here.

The application of this standard to the instant case reveals that certiorari should not be granted. The issue decided by the Ninth Circuit--whether the one-time sale of an item by a private individual via the eBay Internet auction site provided sufficient "minimum contacts" to support personal jurisdiction over a non-resident defendant in buyer's forum state--is not an unsettled question of law pursuant to SUPREME COURT RULE 10 (C), but was in fact determined by existing and well established past precedents. As Boschetto concedes, this Court has issued numerous decisions on the issue of personal jurisdiction and the requisite "minimum contacts" with the forum state needed to establish jurisdiction over a defendant. *Petition*, p. 5.

This Court has set forth the two elements required by due process before a forum state can exercise personal jurisdiction over a non-resident defendant: (1) the non-resident must have sufficient minimum contacts with the forum state so that the defendant could anticipate being haled into the courts in the forum state; and (2) it must be fair and reasonable to require the non-resident to defend the suit in the forum state. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-78 (1985). These elements ensure that persons have "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign." *Id.* at 472 (*quoting Shaffer v. Heitner*, 433 U.S. 186, 218 (Stevens, J., concurring). In fact,

> "[T]he constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum

> state" in order to ensure that a defendant "will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts . . . or of the 'unilateral activity of another party or a third person."

Burger King, 471 U.S. at 474-75 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). A defendant's "conduct and connection with the forum state" must be such that the defendant "should reasonably anticipate being haled into court there." *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 297 (1980).

This Court has established the following test for analyzing a claim of specific jurisdiction:

> (1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
>
> (2) The claim must be one which arises out of or relates to the defendant's forum-related activities; and
>
> (3) The exercise of jurisdiction must comport with fair play and substantial justice, *i.e.* it must be reasonable.

Burger King, 471 U.S. at 475-477.

The lower courts have repeatedly used this test in cases where they address whether transactions over the Internet provide sufficient "minimum contacts" necessary for a finding of personal jurisdiction. Indeed, application of this precedent to cases involving the Internet "is quite natural since much communication over the Internet is still transmitted by ordinary telephone lines." *Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506 511-512 (quoting *AT&T Corp. v. City of Portland*, 216 F.3d 871, 874 (9th Cir. 2000)).

1. Existing Law Has Established That Selling An Item Through An eBay Auction Does Not Constitute 'Purposeful Availment' Of The Forum State Where The Highest Bidder Happens To Reside

Other state and lower federal courts have addressed the application of traditional personal jurisdiction authorities to online auctions, like the eBay auction in this case. An overwhelming majority of courts have concluded that the personal sale of an item through an online auction does not rise to the level of purposeful conduct which is required to assert personal jurisdiction over a non-resident defendant.

In *Metcalf v. Lawson*, 148 N.H. 35 (2002), for example, the New Hampshire Supreme Court declined to exercise personal jurisdiction over a New Jersey defendant who sold an excavator via eBay to a forum resident. The court based its decision on the

fact that the seller had no control over who would ultimately be the winning bidder, did not intentionally direct her activities at New Hampshire, and was not aware that she was contracting with a New Hampshire resident until after the transaction was completed. *Metcalf*, 148 N.H. at 40. The court also noted the isolated nature of the transaction and the absence of any evidence that the defendant was a commercial seller. *Id.*

In *Gossett v. HBL, LLC*, 2006 WL 1328757 (D. S.C. 2006), the court declined to exercise jurisdiction over a Virginia dealership based on its sale of a Porsche to a forum resident through a standard eBay auction. The court held that the dealership's "mere listing on eBay is not enough to invoke jurisdiction in South Carolina." *Id.* at *2. The court found that the dealership, by placing an item for auction on eBay from its Virginia location, "did not advertise specifically toward South Carolina" and "anyone could have accessed its listing on the internet." *Id.*

In *Sayeedi v. Walser*, 2007 WL 623521 (N.Y. City Civ. Ct., Feb. 27, 2007) the defendant (a Missouri resident) sold an engine through an eBay auction to the plaintiff, a resident of New York. The court held that there was no personal jurisdiction over the Defendant merely because he sold the engine through an eBay auction to a New York resident. The court reasoned: "In the typical on-line auction sale the ultimate destination of any item is completely determined by the potential buyers through the bidding process. Accordingly, to summon the Defendant into a New York court on

this matter would contravene the traditional notions of 'fair play' and 'substantial justice' that have become the touchstone of personal jurisdiction." *Id.* at *4.

In *United Cutlery Corp. v. NFZ, Inc.*, 2003 WL 22851946 (D.Md. 2003), the Maryland Court declined to exercise personal jurisdiction over an Ohio defendant where the sole asserted basis for jurisdiction was sales made by the defendant to the forum through Internet auction sites. The Court placed particular emphasis on the fact that the seller's "manifested intent was to sell to the highest bidder, regardless of the state in which the bidder resided," and that this, without more, was insufficient to show the defendant intentionally directed his Internet business activities to residents of the forum state. *Id.* at *4-*5.

In *Winfield Collection, Ltd. v. McCauley*, 105 F.Supp.2d 746 (E.D.Mich. 2000), a Michigan plaintiff brought a copyright infringement action against a Texas defendant who sold crafts on eBay that allegedly used the plaintiff's protected artistic patterns. The defendant sold crafts to two residents of the forum state (Michigan) who happened to be the highest bidders. The Court declined to permit personal jurisdiction over the individual defendant because it found that the purpose of an auction is to award the property offered to the highest bidder, and that the seller exercises no control in determining who the highest bidder will be. *Id.* at 749. Thus, the

District Court concluded the defendant "cannot be said from these sales of this kind to have 'purposefully availed herself of the privilege of doing business" in the forum state because "[s]uch sales are a 'random' and 'attenuated' contact." *Id.*

In *Action Tapes, Inc. v. Weaver*, 2005 WL 3199706 (N.D.Tex. 2005), a Texas plaintiff sued a Missouri defendant for sales of allegedly copyright-protected embroidery patterns through on-line auctions on the eBay website. The court reasoned that an eBay seller's contact with the winning bidder's forum is "the exact type of 'random, fortuitous, and attenuated' event that the *Burger King* Court intended to exclude from jurisdictional reach." *Id.* at *3 (*quoting Burger King*, 471 U.S. at 475); *see also Action Tapes, Inc. v. Ebert*, 2006 WL 305769 (N.D.Tex. 2006) (finding no personal jurisdiction over an eBay seller where the traditional auction process was not altered or circumvented in any way).

In *Ginsburg v. Dinicola*, 2007 WL 1673533 (D. Mass. 2007), a Massachusetts plaintiff sued the operator of a company in New York that restores and sells used automobiles throughout the United States for allegedly selling him a "fake" vintage automobile through an on-line auction on the eBay website. In declining to exercise jurisdiction, the District Court reasoned that there was no evidence that the defendant had any additional contacts with the

forum state (Massachusetts) other than the single sale on the eBay website. *Id.* at *4.

The clear weight of this settled jurisprudence, dating back eight years, establishes that the mere sale of an item through a typical online auction does not subject the seller to personal jurisdiction where the highest bidder happens to reside.

In those rare Internet commerce cases where other courts have found personal jurisdiction where the buyer resides, those findings were based on facts far different from those presented here. In *Dedvukaj v. Maloney*, 447 F. Supp. 2d 813 (D. Mich. 2006), for example, the Michigan District court exercised personal jurisdiction over non-resident New York defendants based on two auctions for paintings where the winning bidder was a resident of Michigan. In finding that personal jurisdiction existed over the New York eBay sellers, the court placed heavy emphasis on the fact that the defendants ran an ongoing on-line business and were "highly sophisticated sellers with an extensive offering of merchandise and a volume of business that require[d] a warehouse." *Id.* at 822. The facts in *Dedvukaj* were far different from the facts here, where Hansing made a one-time, non-commercial sale in his individual capacity.

Similarly, in *McGuire v. Lavoie*, 2003 WL 23174753 (N.D.Tex., Aug. 19, 2003), the court found jurisdiction in an on-line auction case because the

Wisconsin seller ended the auction prematurely and entered into a traditional sales relationship with the buyer through a series of agreements by which the seller sold twenty tractors to the buyer over a seven month period. During the course of their several month relationship, the defendant also knew the identity of the buyer and that the buyer was a resident of the forum state (Texas). *Id.* at *1, *3. The facts of the present case are far different. It is undisputed that this was a one-time sale of a personal item to an anonymous bidder completed through the normal on-line auction process. Hansing did not know the identity or location of the winning bidder until *after* the sale was completed.

The cases with facts similar to those in the instant case were consistently decided using the well established precedent set forth by this Court to determine the existence of sufficient "minimum contacts" for personal jurisdiction. The application of these sound principles has led to the conclusion that the mere sale of an item through a typical online auction does not subject the seller to personal jurisdiction wherever the highest bidder happens to reside. Boucher Ford submits that the issues raised by Boschetto can and have, in fact, been decided using the traditional jurisdictional analysis previously provided by this Court. It is not necessary for this Court to revisit the sound principles it has created to analyze personal jurisdiction issues which apply with equal force to the instant case and cases like it.

C. The Fact That The Ninth Circuit Did Not Apply The "Effects Test" To Its Personal Jurisdiction Analysis Does Not Warrant Review By This Court

Boschetto argues that the Ninth Circuit erred in failing to apply the "effects test" which was enunciated by this Court in *Calder v. Jones*, 465 U.S. 783 (1984), in its analysis of Hansing and Boucher Ford's "purposeful availment" of the forum state as necessary to confer personal jurisdiction. *Petition*, p. 9. Boschetto asserts that the Ninth Circuit instead evaluated the "purposeful availment" analysis using the standards set forth in cases involving contract disputes rather than those sounding in tort, and argues that use of the *Calder* effects test militates in favor of finding personal jurisdiction over Respondent. *Id.*

Boschetto also claims, without basis, that the Ninth Circuit erred because it would be "patently unreasonable and unfair" to allow an individual seller, like Hansing, to take advantage of modern technology in selling his vehicle to a California resident without being subject to jurisdiction in California. *Petition*, p. 12-13. Such alleged errors by the Ninth Circuit cannot be the subject of a writ of certiorari, as "[i]t has been reiterated many times that the Supreme Court is not primarily concerned with the correction of errors in lower court decisions."

Gressman, Geller et al., SUPREME COURT PRACTICE at 276.

1. Contrary To Boschetto's Assertions, The Application Of The "Effects Test" To This Case Is Of No Consequence Because It Does Not Lead To A Finding Of Personal Jurisdiction

Boschetto's argument that the Ninth Circuit erroneously failed to apply the "effects test" set forth by this Court in *Calder v. Jones*, aside from being misplaced, is of no consequence because its application would not change the outcome reached by the Court of Appeals.

In order to satisfy the effects test, a plaintiff must show that defendant: (1) committed an intentional act; (2) the act was expressly aimed at the forum state, and (3) causes harm she knows is likely to be suffered in that jurisdiction. *See Calder*, 465 U.S. at 788-790.

Here, as a threshold matter, Boschetto cannot show that Hansing, much less Boucher Ford, purposefully directed any activity at California. It is undisputed that Hansing did not know the identity or location of the winning bidder until after the sale was completed. Additionally, Boschetto has not shown that Hansing specifically aimed or tailored his auction to Boschetto specifically, to the residents of California, or for that matter, any state in particular.

Boschetto can and does argue Hansing could foresee that California residents would bid on his auction, but as long established by this Court, foreseeability is not enough. *Burger King*, 471 U.S. at 474 (quoting *World-Wide Volkswagen Corp. v. Woodson* 444 U.S. at 295.)

Merely advertising over the Internet is not sufficient to confer jurisdiction throughout the United States, despite the possibility that the advertisement or website at issue may be viewed nationwide. *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1155-57 (9th Cir. 2006). The defendant must do "something more" for courts to conclude that he or she "expressly aimed" activity at the forum, such as individually targeting its residents. *Schwartzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 807 (9th Cir. 2004). Here, Hansing did no such thing. He simply allowed persons with eBay access throughout the United States and Canada to bid on the subject vehicle.

The cases cited by Boschetto in support of his assertion that the effects test will yield a finding of jurisdiction over Boucher Ford are readily distinguishable because their facts reveal that the defendants in those cases either engaged in multiple and ongoing transactions and discussions with the plaintiffs, committed an intentional act or acts specifically targeting the plaintiffs and/or were using the Internet for something more than the one-time sale of an automobile on eBay.

In *Dudnikov v. Chalk Vermillion Fine Arts, Inc.*, 514 F.3d 1063 (10th Cir. 2008) the defendants, after viewing the plaintiffs' auction page, sent a notice of copyright infringement to eBay in order to intentionally suspend plaintiffs' auction, which in turn allegedly caused harm to plaintiffs' business in the forum state (Colorado). The plaintiffs' eBay auction page disclosed their location in Colorado. The defendants also directly contacted the plaintiffs in Colorado and threatened them with suit in federal court. The 10th Circuit, applying the effects test, found that personal jurisdiction existed over non-resident defendant. In reaching its conclusion, the 10th Circuit relied heavily on the fact that the defendants engaged in intentional acts with the intent to halt plaintiffs' auction and had knowledge that the plaintiffs were in the forum state when they took deliberate steps to hurt plaintiffs' business. *Id.* at 1077-1078. In reaching its conclusion, the Tenth Circuit was careful to limit the applicability of the effects test to cases in which there were intentional actions expressly aimed at the forum state, noting that simply holding an on-line auction on eBay is not proper grounds for a finding of personal jurisdiction. *Id.* at 1074.

McGuire v. Lavoie, 2003 WL 23174753, also stands in contrast to the present case. In *McGuire*, the Wisconsin seller first started selling tractors on the eBay on-line auction website, then terminated the auctions and began a traditional sales relationship with the buyer, a Texas resident,

through a series of agreements in which the seller eventually sold twenty tractors to the buyer over a seven month period. The seller knew the buyer's identity and that the buyer was resident of the forum state (Texas) throughout the parties' sales relationship. *Id.* at *1, *3.

In *Fletcher Jones West Shara v. Rotta*, 919 So.2d 685 (Fla.App.3 Dist. 2006) the court made a finding of personal jurisdiction when the seller, an automobile dealership, initiated communications with the buyer, a Florida resident, for the sale of a luxury automobile. In the course of their transaction, the seller made misrepresentations to the buyer knowing that he was both in the forum state (Florida) and a resident of that state. Much like in *McGuire*, the dispute between the parties had its origins in an eBay transaction, but the buyer and seller later engaged in a business relationship outside the parameters of a simple on-line auction, with the seller actually contacting the buyer in the forum state and making the misrepresentations during direct communications with the buyer knowing he was in the forum state. *Fletcher Jones*, 919 So.2d at 686-687.

The facts in *Verizon Online Services v. Ralsky*, 203 F.Supp.2d 601 (E.D. Va. 2002) are also different to those in the present case. In *Verizon* the defendants, professional spammers, targeted plaintiff Verizon Online Services by deliberately sending millions of unsolicited bulk e-mails ("UBE") to

Verizon's servers, seven of which were in the forum state (Virginia). The defendant intentionally sent the UBE to Verizon's servers to solicit business from Verizon's customers for pecuniary gain. *Id.* at 617. In finding the defendants subject to the jurisdiction of Virginia, the *Verizon* court greatly relied on the deliberate nature of defendants' conduct towards Verizon and noted that the sending of the UBE to Verizon's serves was "not a one-shot affair." *Id.* (quoting *Compuserv Inc. v. Patterson*, 89 F.3d 1257, 1265 (6th Cir. 1996)).

In *Internet Doorway, Inc. v Parks*, 138 F.Supp.2d 773 (S.D. Miss. 2001), the court made a finding of personal jurisdiction over a Texas defendant based on the defendant's intentional acts of sending quantities of unsolicited e-mail advertising pornographic websites into the forum state (Mississippi) and falsifying the "from" header in the unsolicited e-mails to make it appear as if the e-mail had been sent from the plaintiff, an Internet service provider located in the forum state for pecuniary gain. The Texas defendant's acts caused the plaintiff damage in the forum state. In finding defendant subject to the forum state's jurisdiction, the court relied on the active, rather than passive nature of the defendant's acts of sending unsolicited e-mails for pecuniary gain knowing that it would be received and opened in the forum state, as well as the deliberate action defendant took toward the plaintiff. *Id.* at 777, 779-780.

In stark contrast, Boschetto has not shown that either Hansing, the seller of the vehicle or Boucher Ford, which had no role in the transaction whatsoever, directed any activity at California, or specifically targeted any California residents, including Boschetto. Hansing made a one-time sale of a personal item on eBay, permitting those with eBay access to bid on his car, agreeing to let the highest bidder retrieve the car in Wisconsin.

Although *Fletcher* and *McGuire* both involved on-line auctions, it is evident that the sellers in those cases were commercial vendors engaged in something more than just selling a single item on eBay. The sellers in these cases transacted directly with the buyers with full knowledge of the buyers' identity and location, thus individually targeting the residents of the forum states. *See Pebble Beach Co.*, 453 F.3d at 1157.

Verizon and *Internet Doorway* are also readily distinguishable because the defendants in these cases were spammers who sent untold numbers of unsolicited e-mails for pecuniary gain specifically targeting the residents of the forum states.

ALS Scan, Inc. v. Digital Service Consultants, Inc. 293 F.3d 707, 714 (4th Cir. 2002) does not support Boschetto's arguments at all because its facts are distinguishable from the present case. The defendant in *ALS* was an Internet Service Provider whose electronic signals were received in Maryland,

the forum state. In *ALS*, the Fourth Circuit nonetheless refused to extend personal jurisdiction over the defendant Internet Service Provider where the defendant did not direct any of its electronic activity at any target in the forum state. *Id.* at 714.

D. The "Sliding Scale" Test Developed In The *Zippo* Case And Discussed By Boschetto In His Petition For Certiorari Is Not Applicable To The One-Time Sale Of An Item On eBay By A Non-Commercial Seller And Only Serves To Confuse The Issues

The "sliding scale" analysis developed in *Zippo MFG. Co. v. Zippo Dot Com, Inc.* 952 F.Supp. 1119 (D. Pa. 1997) seeks to distinguish interactive from passive websites. Under the *Zippo* sliding scale test, "proper exercise of personal jurisdiction in a claim involving Internet contact is directly proportional to the commercial interactivity of the website over which the contact is made." *Action Tapes v. Weaver*, 2005 WL at *2. Inevitably, this type of analysis yields variant views because, by its very definition, it factors in the spectrum of the commercial interactivity of the websites at issue.

However, contrary to Boschetto's assertions, courts have consistently declined to apply the *Zippo* sliding scale analysis to tests to eBay auctions because in these cases, it is eBay, and not the user, who controls the interactivity and marketing efforts of the website.

In *Action Tapes v. Weaver,* the Texas Northern District Court declined to extend the *Zippo* test to eBay auctions, recognizing that eBay sellers do not maintain or control the "interactivity" of the eBay website. *Action Tapes v. Weaver*, 2005 WL at *2. In doing so, the *Action Tapes* court reasoned that buyers and sellers who connect through eBay "cannot be said themselves to control eBay's degree of commercial interactivity any more than a buyer and seller at Sotheby's can be said to be responsible for the premises or to control the auctioneer" *Id.*

The District Court in *McGuire* made a similar finding, noting that "[b]ecause the majority of cases applying the *Zippo* test involve defendant's conduct over its own website, its application to an internet auction site is questionable." *McGuire*, 2003 WL 23174753 at *3.

In *Metcalf v. Lawson*, 148 N.H. 35, the New Hampshire Supreme Court also refused to apply the *Zippo* test to an Internet auction, observing that the test is "not particularly helpful" in Internet auction cases because a defendant seller conducts his auction over a third party website which he does not maintain and cannot control. *Id.* at 39.

Similarly, the Massachusetts District Court in *Ginsburg v. Dinicola*, 2007 WL 1673533 refused to extend the *Zippo* sliding scale test to an eBay

auction, noting that "this [sliding] scale test has been applied in cases which the issue is a defendant's conduct on a website that the defendant controls." *Id.* at *3, fn. 1.

Here, the eBay auction site temporarily advertised a good for sale by a Hansing, a private individual. The listing closed once the item was sold, extinguishing the Internet contact between the buyer and seller with this transaction.

The cases cited by Boschetto to support his argument for the application of the sliding scale analysis contain facts readily distinguishable from the present case. In *Zippo*, the defendant owned and operated the website at issue. *Zippo*, 952 F. Supp. At 1121. In *People v. Lipsitz*, 663 N.Y.S.2d 468 (1997), as Boschetto fails to mention, the defendant ran an ongoing business in which he sold magazine subscriptions from the forum state while physically present in that forum, and the wrongful acts at issue "physically occurred" in the forum state. *Id.*, 471-473-474.

In *Digital Equip. Corp. v. AltaVista Technology, Inc.*, 960 F.Supp. 456, 471 (D. Mass. 1997), the Massachusetts District Court found that defendant Alta Vista Technology, Inc. ("ATI") was subject to personal jurisdiction in Massachusetts where: ATI had entered into an ongoing contract with Plaintiff that included a clause requiring that the contract be interpreted "under and in accordance"

with the laws of Massachusetts, it was ATI's alleged breach of this contract that gave rise to Plaintiff's lawsuit, and ATI operated its own website accessible to Massachusetts computer users and had made at least three different sales to Massachusetts residents of software products in the course of and related to the operation of its website. *Id.* at 464.

The facts in the instant case are markedly different. Boucher has not alleged that any contract with a choice of law clause was ever entered into by Boucher Ford or Hansing. Neither Hansing nor Boucher Ford operated the eBay auction website, neither engaged in multiple transactions with California residents and neither where physically present in California during the one-time eBay auction.

In *Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506, 510-511 (D.C. Cir. 2002), the District of Columbia Court of Appeals, applying the sliding scale test, suggested that personal jurisdiction over defendant securities broker in Nebraska could exist based solely on the level of interaction offered by the website that the defendant owned and operated. *Id.* at 513 However, in using *Gorman* to support his argument for the application of the *Zippo* sliding scale analysis Boschetto again ignores the basic fact that it is eBay and not Hansing or Boucher Ford who owned and operated the on-line auction website.

E. The Exercise of Jurisdiction Over Boucher Ford Would Be Unreasonable

Personal jurisdiction is permissible only so long as the exercise of jurisdiction over a non-resident defendant comports with fair play and substantial justice. *Asahi Metal Industry Co., Ltd. v. Superior Court*, 480 U.S. 102, 113 (1987). In *Asahi*, this Court held it would be unreasonable to exercise jurisdiction over a foreign corporation that had virtually no contact with the forum state, as is the case here. This Court considered such factors as the interests of the forum state in adjudicating the claim, plaintiff's interest in obtaining relief, and the burden on the defendant of appearing in the forum. *Id.* at 113-116.

Here, it would be grossly unjust to require Boucher Ford, a Wisconsin corporation, to defend this case in California based on the unilateral activity of one of its employees which had no connection to Boucher Ford's business. Boschetto is entirely capable of litigating in Wisconsin just as he chose to bid on and purchase a vehicle he knew was located in that state. Boucher Ford would face significant hardship in litigating thousands of miles from its only place of business. This is particularly true given its nonexistent contacts with California and the fact that none of the activities underlying the claims against it occurred in California. Indeed, Boucher Ford would be forced to shuttle witnesses,

documents and other evidence relating to the underlying transaction back and forth between Wisconsin and California.

CONCLUSION

For all of the foregoing reasons, Boucher Ford respectfully requests that this Court deny Boschetto's Writ of Certiorari.

Respectfully submitted,

TIMOTHY C. DAVIS
Counsel of Record
JOSE A. CORDOVA

THE DAVIS LAW FIRM
625 Market Street, 12th Floor
San Francisco, CA 94015
(415) 278-1400

Counsel for Respondents Gordie Boucher Ford Lincoln-Mercury of Janesville, Inc.